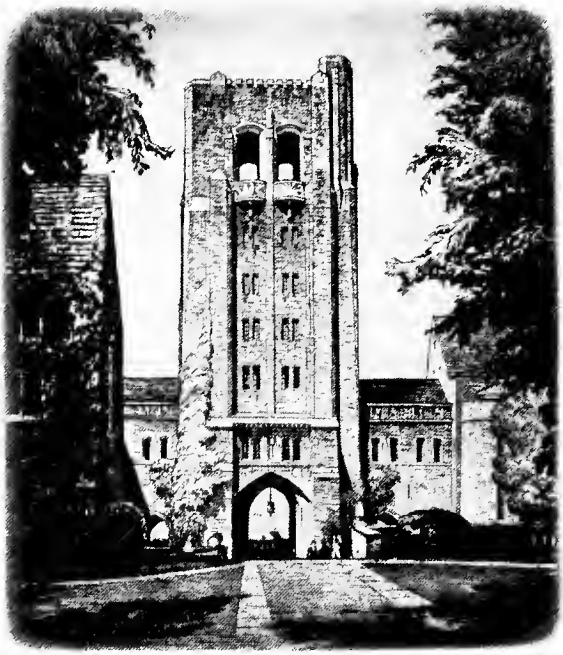

CASES ON CRIMINAL LAW.

To accompany this volume.

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CASES ON CRIMINAL LAW.

A COLLECTION

OF

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BY

H. W. CHAPLIN.

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BY

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CASES ON CRIMINAL LAW.

CHAPTER I.

Sources of our Criminal Law.

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COMMONWEALTH *v.* KNOWLTON,

2 Mass. 530 [1807].

The indictment in this case was found at the Court of General Sessions of the Peace for this county, May term, 1803. It alleges that there is a certain river or stream in this county, which empties itself into the river Kennebeck, called Sandy River, up and through which said Sandy River salmon, shad, and alewives have been wont to pass to the ponds adjacent to cast their spawn, and which river ought by law to be free from all obstructions whatever; yet that the defendant, not ignorant of the premises, at Farmington, in said county, on the first day of June, 1801, with force and arms, built and erected a mill-dam across said Sandy River, and being owner and occupant thereof, the same hath continued to the present time, without making or providing a sufficient sluice or passage-way either through or round the said dam for the said fish to pass up as by law he ought to have done. By reason whereof the said fish have been and still are obstructed in their passing up the said river, "to the great injury of the public, in evil example to all others in like cases offending, against the peace and dignity of the Commonwealth, and contrary to the form of the statute in such case made and provided."

Upon not guilty pleaded at the Court of Common Pleas,[1] he was convicted and sentenced, and appealed to this court, where at September term, 1805, he was again tried and found guilty.

[1] By statute passed March 9, 1804, all the powers and duties of the Sessions, with certain exceptions, were transferred to the Courts of Common Pleas; and all indictments, etc., then pending in the Sessions were to be proceeded in and determined by the Courts of Common Pleas.

After verdict the defendant moved in arrest of judgment, because by law the said indictment did not lie at said Court of General Sessions of the Peace, and said court last named had by law no jurisdiction of the offence charged in said indictment.

CURIA. The defendant moves in arrest of judgment, on two grounds.

The second objection, founded on the want of jurisdiction of the Sessions, has great weight.

The Court of Sessions, to whose jurisdiction in criminal causes the Court of Common Pleas has succeeded, by statute of March, 1804, was erected by the statute of July 3, 1782, and it is empowered to hear and determine all matters relating to the conservation of the peace, and such offences as are cognizable by them at common law, or by the acts of the legislature. If by common law, mentioned in this statute, be understood strictly the common law of England, those words cannot have any effect; for the Sessions being created by statute cannot have any jurisdiction but what is given it by some statute. But, if these words import the common law of the Commonwealth, they have an extensive operation and are easily understood. Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages, originating probably from laws passed by the legislature of the colony of the Massachusetts Bay, which were annulled by the repeal of the first charter, and from the former practice of the colonial courts accommodated to the habits and manners of the people.

So much therefore of the common law of England as our ancestors brought with them, and of the statutes then in force, amending or altering it; such of the more recent statutes as have been since adopted in practice; and the ancient usages aforesaid may be considered as forming the body of the common law of Massachusetts, which has submitted to some alterations by the acts of the provincial and State legislatures, and by the provisions of our Constitution.

From these principles we may conclude that the Sessions in England, having at the time of the emigration jurisdiction of all trespasses (except perhaps forgery and perjury, see 2 East's Rep. 18), which were offences against law, when the statute of 34 Ed. 3, c. 1. was passed,

giving the Sessions (among other things) the cognizance of all trespasses; our Court of Common Pleas, as successor of the Sessions, has jurisdiction of the same trespasses by the common law of the Commonwealth; and that it has jurisdiction of no other trespasses, unless derived expressly from some statute.

The offence, of which the defendant is indicted, is clearly not an offence at common law, but it is a new offence created by the statute, on which this indictment is drawn, as it is not supposed that there is any other statute by which the Sessions can have jurisdiction; the validity of the objection to judgment on this conviction must depend on the construction of the statute on which it was obtained. In the twelfth section it is enacted, that all the fines imposed shall be recovered by presentment of the grand jury, or by action of debt. This section does not expressly, or by necessary implication, include the Sessions, for the words may be perfectly satisfied by a presentment of the grand jury to this court. And the Sessions before the statute of March, 1804, or the Common Pleas since, not having jurisdiction at common law, nor by the express provisions of any statute, the

Judgment must be arrested.

COMMONWEALTH *v.* CHURCHILL,

2 Met. 118 [1840].

At the last September term of the Court of Common Pleas, the defendant was convicted on four counts in an indictment, the first of which alleged that he, "at Stoughton in said County of Norfolk, on the 16th day of March last past, did sell to one ——, one glass of brandy to be by him, the said ——, then and there used, consumed, and drank in the dwelling-house there situate of him the said Samuel, he the said Samuel not being then and there duly licensed, according to law, to be an innholder or common victualler; against the peace, etc., and contrary to the statute in such case made and provided." There were five other counts similar to the first, except that different kinds of spirituous liquor were alleged to have been sold to five different persons on several different days, to wit, on the 17th, 18th, 19th, 20th, and 21st of March, 1840. On two of the counts the defendant was acquitted.

The defendant filed exceptions to the ruling of *Strong*, J., before whom the trial was had: "1. Because the court instructed the jury that the 2d and 3d sections of c. 47 of the Revised Statutes, on which the indictment is founded, are binding and valid, when the defendant contends that they are unconstitutional and void. 2. Because the court instructed the jury that those sections were still in force as law,

when the defendant contends that they are repealed by subsequent legislative enactments."

. . . . . .

SHAW, C. J. It appears by the record that the defendant was indicted for selling spirituous liquors without license, on the 16th day of March last, and at several times afterwards, and that upon a trial of the indictment, in the Court of Common Pleas, he was convicted. Two exceptions were taken to the directions and opinion of that court in matter of law, upon which the case has been brought before this court, pursuant to the statute. These exceptions were as follows: 1. That the 2d and 3d sections of the 47th chapter of the Revised Statutes, upon which this prosecution is founded, are unconstitutional and void. 2. Because the court instructed the jury that these sections were in force as law, at the time when the acts charged as offences were alleged to be done; whereas the defendant contended that they were repealed by a subsequent act of the legislature. Upon the first no argument has been offered, and it does not seem to be insisted on. The second depends upon the question whether the statute of 1840, c. 1, passed on the 11th of February, 1840, and which went into operation in thirty days from its passage, to wit, March 13, 1840, simply repealing the statute of 1838, c. 157, did, by its legal operation, revive the 2d and 3d sections of the 47th chapter of the Revised Statutes. If it did, the case of the defendant was within them, the acts all being charged to have been done after the 13th of March last, and the acts themselves being made punishable by those provisions of the Revised Statutes.

. . . . . .

It is conceded to be a maxim of the common law, applicable to the construction of statutes, that the simple repeal of a repealing law, not substituting other provisions in place of those repealed, revives the pre-existing law. As a maxim of the common law, it was in force here when the Constitution of the Commonwealth was adopted. By that Constitution it was declared that "all the laws, which have heretofore been adopted, used, and approved in the colony, province, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution." This Constitution has been construed as adopting the great body of the common law, with those statutes made before the emigration of our ancestors, which were made in amendment of the common law, so far as these rules and principles were applicable to our condition and form of government. Commonwealth *v.* Leach, 1 Mass. 59. Commonwealth *v.* Knowlton, 2 Mass. 534.

But it was contended, at the argument, that under this provision no principle or rule of the common law could be regarded as adopted, unless it could be shown affirmatively that it had been adjudicated before the Revolution. But we apprehend this would be much too narrow a construction. Before the Revolution, we had no regular reports of judicial decisions; and the most familiar rules and principles of law — those which lie at the foundation of our civil and social rights — could not be so proved. No; we rely on usage and tradition, and the well known repositories of legal learning, works of approved authority, to learn what are the rules of the common law; and we have no doubt that these were the great sources to which the above pregnant provision of our Constitution refers.

Taking it then as well established that the rules and maxims of the common law, referred to in the Constitution, were those which our ancestors brought with them, and which had been, to some extent, modified and adapted to our condition by the legislative jurisprudence of the colonial and provincial governments, it follows that these rules and principles were regarded as binding both upon legislators and judges in their respective departments. A part of this system are the well known rules of construction for the expounding of statutes, which are as much a part of every statute as its text. These are presumed to be known and kept in view by the legislature in framing the statute; and they must be alike regarded by judges in expounding it.

It was further insisted in the argument, that the legislature could not have intended, when they repealed one license law, in effect to re-establish another. But their intentions must be ascertained by their acts alone, and not by evidence *aliunde*. We cannot possibly know the intentions of members of the legislature. It is the will of the aggregate body as expressed in the statutes which they pass, which can be regarded as having the force of law; any different construction would lead to the greatest confusion and uncertainty. The legislature are presumed to understand and intend all consequences of their own measures; and the only safe course is for courts of justice to expound the intentions of the legislature by their acts, and those acts construed by known and established rules of construction.

On the whole, the Court are of opinion that the simple repeal of St. 1838, c. 157, by that of 1840, c. 1, did revive the 2d and 3d sections of the Rev. Stats. c. 47, and that the provisions of those sections were in force at the time of the offences charged in the indictment, and that the conviction was right. *Exceptions overruled.*

COMMONWEALTH *v.* CALLAGHAN AND HOLLOWAY,

2 VIRGINIA CASES, 460 [1825].

THIS was a case adjourned by the Superior Court of Law of Alleghany County. The case itself is fully set forth in the following opinion of the General Court, delivered by *Barbour*, J.

This is an adjourned case from the Superior Court of Law for the County of Alleghany.

It was an information filed against Callaghan and Holloway, two of the justices of Alleghany, alleging in substance the following charge: That at a court held for the County of Alleghany, there was an election for the office of commissioner of the revenue and of clerk of said court, when the defendants were both present, and acting in their official character as magistrates in voting in said election; that the defendant Callaghan, in said election for commissioner of the revenue, wickedly and corruptly agreed to vote, and in pursuance of said corrupt agreement did vote, for a certain W. G. Holloway, to be said commissioner, in consideration of the promise of the defendant Holloway that he would vote for a certain Oliver Callaghan to be clerk of said court; and that the defendant Holloway in the said election of clerk wickedly and corruptly agreed to vote, and in pursuance of said corrupt agreement did vote, for a certain Oliver Callaghan to be said clerk, in consideration of the promise of the defendant Callaghan that he would vote for the aforesaid W. G. Holloway to be commissioner. To this information the defendants demurred generally, and there was a joinder in the demurrer. The Superior Court of Law of Alleghany, with the assent of the defendants, adjourned for novelty and difficulty to this court the questions of law arising upon the demurrer to the information and particularly the following, namely:

1. Is there any offence stated in said information for which an information or indictment will lie?

2. Is the offence charged in the said information within the true intent and meaning of the Act of the General Assembly entitled "An Act against buying and selling offices," passed Oct. 19, 1792, in page 559, 1st vol. Rev. Code of 1819?

3. If the offence be within the said act is the information filed in this case a good and sufficient information?

The first and second questions, for the sake of convenience, will be considered together.

It is proper to premise that a general demurrer admits the truth of

all facts which are well pleaded; there being such a demurrer in this case, and the information distinctly alleging that the defendants, in giving their votes respectively, acted wickedly and corruptly, such wicked and corrupt motive will be considered throughout as forming a part of the case.

The Court are unanimously of opinion that the case as stated in the information is not within the true intent and meaning of the Act of Assembly referred to in the second question. That act embraces two descriptions of cases: 1. The sale of an office or the deputation of an office; 2. The giving a vote in appointing to an office or the deputation of office. It would be within the latter description that this case would fall, if within either; but the Court are decidedly of opinion that this case does not fall within this description, because the plain construction of the statute is that the penalties which it denounces are incurred only by those who receive or take, either directly or indirectly, any money, profit, etc., or the promise to have any money, profit, etc., *to their own use* or *for their own benefit.* In this case it appears from the information that the promise of each of the defendants to the other, which constituted the consideration of the vote of that other, and the vote given in consequence of such promise, enured not to the benefit of the defendants or either of them, but to the benefit of others. If indeed it had been alleged in the information that the persons for whom the votes were given, were, if elected, to have held them upon any agreement, that the defendants should in any degree participate in their profits or receive from the holders of them any benefit or advantage, the case would have been different, for then the defendants would have received a profit *indirectly*, and thus would have fallen within the statute; but there is no such allegation.

The Court being thus of opinion that this case was not embraced by the statute, but at the same time considering that that system of criminal jurisprudence must be essentially defective which had provided no punishment for acts such as are charged in the information, and which merit the reprehension of all good men, were led to inquire whether the acts charged in the information did not constitute an offence at common law; and they are of opinion that they do.

In relation to those offences which rise to the grade of felony there is usually, particularly in the designation of them by name, an accuracy in the definition; as, for example, murder, burglary, arson, etc., in each of which the term *ex vi termini* imports the constituent of the offence; but in the general classification of crimes whatever is not felony is misdemeanor. In relation to these, then, they are not only numerous but indefinitely diversified, comprehending every act which, whilst it falls below the grade of felony, is either the omission of some-

thing commanded or the commission of something prohibited by law. As to these the law can do no more than lay down general principles, and it belongs to the courts of the country to apply those principles to the particular cases as they occur, and to decide whether they are or are not embraced by them. Thus the law, as a general proposition, prohibits the doing of any act which is *contra bonos mores.* The particular acts which come up to this description it is impossible to include in any precise enumeration; they must be decided as they occur, by applying this principle to them as a standard. Thus, again, it is now established as a principle that the incitement to commit a crime is itself criminal under some circumstances. 6 East, 464; 2 East, 5. As for example, the mere attempt to stifle evidence, though the persuasion should not succeed. Cases of this kind may be as various as the varying combinations of circumstances.

To come more immediately to the present case, we hold it to be a sound doctrine that the acceptance of every office implies the tacit agreement on the part of the incumbent that he will execute its duties *with diligence and fidelity.* 5 Bac. Abr. 210, Offices and Officers, Letter M. We hold it to be an equally sound doctrine that all officers are punishable for corruption and oppressive proceedings, according to the nature and heinousness of the offence, either by indictment, attachment, action at the suit of the party aggrieved, loss of their offices, etc. 5 Bac. Abr. 212, Letter N.

And further, that all wilful breaches of the duty of an office are forfeitures of it, and also punishable by fine (Co. Litt. 233, 234), because every office is instituted, not for the sake of the officer, but for the good of another or others; and, therefore, he who neglects or refuses to answer the end for which his office was ordained should give way to others, and be punished for his neglect or oppressive execution.

Let us apply these principles to the present case. The defendants were justices of the peace, and as such held an office of high trust and confidence. In that character they were called upon to vote for others, for offices also implying trust and confidence. Their duty required them to vote in reference only to the merit and qualifications of the officers, and yet upon the pleadings in this case it appears that they wickedly and corruptly violated their duty and betrayed the confidence reposed in them, by voting under the influence of a corrupt bargain or reciprocal promise, by which they had come under a reciprocal obligation to vote respectively for a particular person, no matter how inferior the qualifications to their competitors. It would seem, then, upon these general principles that the offence in the information is indictable at common law. But there are authorities which apply particularly to the case of justices. In 1 Bl. Com. 354, n. 17, Christian, it is said

if a magistrate abuse his authority from corrupt motives he is punishable criminally by indictment or information.

Again, where magistrates have acted partially, maliciously, or corruptly, they are liable to an indictment. 1 Term Rep. 692; 1 Burr. 556; 3 Burr. 1317, 1716, 1786; 1 Wils. 7. An instance of their acting partially is that of their refusing a license from motives of partiality, the form of the indictment for which is given in 2 Chitty's Crim. Law, 253.

We are then of opinion, for the reasons and upon the authorities aforesaid, that the offence stated in the information is a misdemeanor at common law for which an information will lie, but that it is not within the statute referred to.

In answer to the third question we are of opinion that the information is a good and sufficient one.

All which is ordered to be certified to the Superior Court of Law for Alleghany County.

COMMONWEALTH *v.* LEACH,

1 Mass. 59 [1804].

The defendants were indicted in the Court of General Sessions for poisoning a cow, the property of A. B. Being convicted in that court they appealed to this, and at the last term thereof were found guilty by the verdict of the jury. The indictment was at common law.

Bliss moved in arrest of judgment on the ground that the Court of Sessions had not jurisdiction in the case.

He said that this was a common-law offence and so laid in the indictment; that justices of the peace were officers not known to the common law, but were created by statute, and of course all their powers were given by statute; and that none of our statutes had given them jurisdiction over the offence charged in the indictment. And he cited 4 Com. Dig. Title, Just. of the Peace, B. 1, and 1 Salk. 406.

Hooker, for the prosecution, conceded that justices of the peace were officers created by statute, and that their jurisdiction and powers were wholly dependent upon the statutes; 2 Hawk, P. C. c. 8, § 13, etc. But he contended that their jurisdiction *here* was not limited to those offences which are expressly, and by name in our own statutes, made cognizable by them; on the contrary, that it extended to all cases in which justices of the peace in England had jurisdiction by any of the statutes of that country which were passed previous to the emigration of our ancestors, which were to be considered as a part of *our* common

law; that this was strongly implied in the Act for establishing Courts of General Sessions of the Peace, passed July 3, 1782 (stat. 1782 c. 14), by the first section of which "they are empowered to hear and determine all matters relative to the conservation of the peace and the punishment of such offences as are cognizable by them at common law, or by the acts and laws of the legislature, and to give judgment, etc. In this act the term "common law" cannot mean the common law of England, because justices of the peace there are not common-law officers; it must, therefore, mean our common law; and on this subject our common law must be precisely what the statute law of England was at the time of the emigration of our ancestors from that country. The statutes which were previous to that time enacted in England, and which define or describe the authorities, powers, and jurisdiction of justices of the peace, give to them expressly cognizance of divers offences which were offences at common law, among which are trespasses. The present indictment is for a trespass, and therefore within the jurisdiction of the Sessions. 2 Hawk. c. 8, §§ 33, 38, 39; 3 Burr. 1320, Rex *v.* Rispall; 1 Lev. 139, Rex *v.* Sommers, *et al.*

Bliss, in reply, conceded that if the statute of Ed. 3 which gives jurisdiction to justices of the peace in England is adopted and makes part of our common law, the objection to the indictment was unfounded; otherwise that it ought to prevail.

THACHER, J. I am of opinion that the statutes of 1 Ed. III. c. 16 and 34 Ed. III. c. 1, respecting the jurisdiction and powers of justices of the peace, have been adopted, used, and approved here, and are to be considered as part of our common law; that the offence charged in the indictment is cognizable by the Court of Sessions, and, therefore, that judgment ought not to be arrested.

SEDGWICK, J. Justices of the peace, whether acting individually or in Sessions, are creatures of statute, and their powers are given them by the statutes. 2 Hawk. 61, 8. It appears to me, generally speaking, that the English statutes which were in force at the time of the emigration of our ancestors from that country are common law here. The statutes of Ed. III. have been adopted and practised upon here, and are therefore to be considered as part of our common law. This is decisive of the question before the court, as the offence charged in the indictment is, by those statutes, within the jurisdiction of the Sessions.

STRONG, J. I have no doubt upon the question. Justices of the peace have exercised this authority for a long time; certainly as far back as the memory of any of us reaches, probably much further, which affords a strong presumption that the statutes of Ed. III. have been considered as common law here. Usage in like points has always been taken as evidence of what is our own law, — common law.

DANA, C. J. The term "common law" ought not to be construed so strictly as is contended for by the counsel for the defendant. Generally when an English statute has been made in amendment of the common law of England, it is here to be considered as part of our common law. For instance, the statute of 7 Ja. I. c. 5 and 21 Ja. I. c. 12, giving double costs to an officer who is sued out of his county, for anything done by him in the execution of his office, being made in amendment of the common law, is adopted here and is part of our common law. So, also, the statute of Anne respecting negotiable notes. Usage of the country establishes and makes the common law of the country. No one, probably, can recollect the period when the Courts of Sessions have not exercised the authority which is now excepted against. Justices of the peace have this authority expressly given them in their commissions. It appears to me that they have uniformly exercised it, and that without being questioned, and therefore that the law is to be considered as settled. *Per* CUR. unanimously.

Motion overruled.

COMMONWEALTH *v.* WARREN,

6 MASS. 72 [1809].

AN indictment found by the grand jury, at the last April term at Ipswich, against the defendant, states that he being an evil-disposed person, and contriving and intending one Benjamin Adams to deceive, cheat, and defraud, falsely pretended and affirmed to the said Adams, that his, the defendant's name was William Waterman; that he lived in Salem, and there kept a grocery store; that he wished to purchase, on credit, of Adams, fifty pairs of shoes, giving his own note as security therefor; that Adams, giving credit to his false pretences and affirmations, sold him the shoes, and took as security the note of the defendant, subscribed by him with the name of William Waterman.

Upon conviction, the defendant moved in arrest of judgment, on the ground that the facts charged in the indictment and of which he had been found guilty, are a private injury only, and do not amount to a public offence.

Story, in support of the motion, cited 2 East's P. C. 819.

PARSONS, C. J. At common law, it is an indictable offence to cheat any man of his money, goods, or chattels, by using false weights or false measures; and by the English statute of 33 H. 8, c. 1, passed before the settlement of this country, and considered here as a part of our common law, cheating by false tokens is made an indictable

offence. The object of the law is to protect persons who in their dealings use due diligence and precaution, and not persons who suffer through their own credulity, carelessness, or negligence. But as prudent persons may be overreached by means of false weights, measures, or tokens, or by a conspiracy, where two or more persons confederate to cheat, frauds effected in either of these ways are punishable by indictment. And by an English statute of 30 G. 2, c. 24, which is not in force in this State, the same prosecution has been extended to cheating by false pretences.

But if a man will give credit to the false affirmation of another and thereby suffer himself to be cheated, he may pursue a civil remedy for the injury, but he cannot prosecute by indictment.

If, therefore, Adams was cheated out of his shoes by the defendant, without using false weights, measures, or tokens, and by no conspiracy, but only by his credulity in believing the lies of the defendant, although he may have an action against the defendant to recover his damages, yet this indictment cannot be maintained, whatever false pretences the defendant may have wickedly used.

And it appears that Adams was imposed on by the gross lies of the defendant. He pretended and affirmed that his name was William Waterman, and that he was a grocer in good credit in Salem. Adams, unfortunately believing him, sold and delivered him the shoes on credit; and when the defendant gave his note as security, he used his false name.

We see here no conspiracy, for the defendant was alone in the fraud; and no false tokens to induce a credit; and as for false weights or measures, there is no pretence. We cannot, therefore, consider the facts stated in the indictment (however injurious they were to Adams) as constituting a public indictable offence.

Judgment arrested.

Bidwell, Attorney-General, for the Commonwealth.

COMMONWEALTH *v.* WARREN AND JOHNSON,

6 MASS. 73 [1809].

THE defendants were indicted at the last April term at Ipswich, for a conspiracy to cheat one Moses Putnam of a large quantity of shoes; and the indictment charged that, in pursuance of the conspiracy, they falsely affirmed that the defendant Warren's name was William Lane; that he lived at Gloucester, and carried on the business of making shoes; that through disappointment, he had not by him the number of

shoes he then wanted for a shipment to the Havanna, and was desirous of purchasing on his own credit a quantity from Putnam; that Putnam trusting to their false and fraudulent affirmations, sold and delivered to them a quantity of shoes, taking Warren's notes for security, which he signed with the assumed name of William Lane.

The defendants pleaded not guilty, and upon trial before *Sewall*, J., were found guilty, subject to the opinion of the court upon evidence as reported by the judge; they moving for a new trial, on the ground that the verdict, as against Johnson, was against evidence; and if he ought to be acquitted, that Warren ought to have been acquitted, as one person alone cannot be guilty of a conspiracy.

It was proved at the trial, that the defendants went together in a chaise to Putnam's; that Warren went into the shop, leaving Johnson in the chaise; that in Johnson's absence Warren made the false affirmations, and obtained a delivery of a parcel of shoes; that Warren told Putnam that Johnson was a man who lived with him; that Johnson then came into the shop, which was small, and was there when Warren made and signed the notes by the name of William Lane; but the witness could not testify that Johnson knew the tenor of the notes; that Warren went the next day to Putnam's shop without Johnson, and under the same feigned name fraudulently purchased two hundred pairs of shoes more; that Johnson had one hundred pairs of the shoes that were thus sold by Putnam to Warren, and by the name of William Smith sold them to one Chase.

The motion for a new trial was shortly argued by *Story* for the defendants, and *Bidwell*, Attorney-General, for the government.

PARSONS, C. J. The gist of the offence is the conspiracy to cheat Putnam of his shoes, and the defendants might lawfully have been convicted, if the jury were satisfied, on legal evidence, that they were guilty of the confederacy charged, although no act done in pursuance of it had been proved.

But Warren's intent to defraud Putnam is not denied, and the question is, whether the jury could lawfully infer that Johnson was an associate and confederate in the same fraudulent design. He went with Warren; he was with him in the shop when he received the shoes, and when he gave the fictitious securities. If Johnson gave no evidence to explain his connection with Warren, whence the jury might infer that it was innocent, they might infer that he was privy to Warren's want of credit, and that he had obtained the shoes fraudulently. If the evidence had rested here the jury might have pressed it too far; but when it was proved that he received a hundred pairs of shoes, and sold them under a fictitious name, the jury might well infer that, as he had his share in the plunder, he was an associate in the villany by

which it was obtained. We cannot therefore say that the verdict as to Johnson is against evidence; but the presumption against him is so strong, that the jury were well warranted to infer his guilt in the conspiracy charged. *Judgment must be entered on the verdict.*

As to Admiralty Jurisdiction before the Revolution, see Charge to the Grand Jury, 1 Quincy, 310 (1789); Scollay *v.* Dunn, id. 74; Advocate-General *v.* Hancock, id. 457.

CHAPTER II.

Criminal Law of the Federal Government.

Section 1. — No Common Law, operating proprio vigore, in the Federal System.

UNITED STATES *v.* HUDSON et al.,

7 Cranch, 32 [1812].

This was a case certified from the Circuit Court for the District of Connecticut, in which, upon argument of a general demurrer to an *indictment* for a libel on the President and Congress of the United States, contained in the "Connecticut Courant" of the 7th of May, 1806, charging them with having in secret voted two millions of dollars as a present to Bonaparte for leave to make a treaty with Spain, the judges of that court were divided in opinion upon the question, whether the Circuit Court of the United States had a common-law jurisdiction in cases of libel.

Pinkney, Attorney-General, in behalf of the United States, and *Dana*, for the defendants, declined arguing the case.

The Court having taken time to consider, the following opinion was delivered (on the last day of the term, all the judges being present) by Johnson, J.

The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common-law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute.

Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdic-

tion been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition.

The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States, — whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions, — that power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer.

It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present. It is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation.

And such is the opinion of the majority of this court; for the power which Congress possess to create courts of inferior jurisdiction necessarily implies the power to limit the jurisdiction of those courts to particular objects; and when a court is created and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction much more extended, in its nature very indefinite, applicable to a great variety of subjects, varying in every State in the Union, and with regard to which there exists no definite criterion of distribution between the district and Circuit Courts of the same district?

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that upon the formation of any political body an implied power to preserve its own existence and promote the end and object of its creation necessarily results to it. But without examining how far this consideration is applicable to the peculiar character of our Constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval probably with the first formation of a limited government, belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our courts of justice from the nature of their institution; but jurisdiction of crimes against the State is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common-law cases we are of opinion is not within their implied powers.

UNITED STATES *v.* COOLIDGE,

1 WHEATON, 415 [1816].

THIS was an indictment in the Circuit Court for the District of Massachusetts, against the defendants, for forcibly rescuing a prize, which had been captured and taken possession of by two American privateers. The captured vessel was on her way, under the direction of a prize-master and crew, to the port of Salem, for adjudication. The indictment laid the offence as committed upon the high seas. The question made was, whether the Circuit Court has jurisdiction over common-law offences against the United States, on which the judges of that court were divided in opinion.

The Attorney-General stated that he had given to this case an anxious attention, — as much so, he hoped, as his public duty, under whatever view of it, rendered necessary; that he had also examined the opinion of the Court, delivered at February term, 1813, in the case of the United States *v.* Hudson and Goodwin; that considering the point as decided in that case, whether with or without argument, on the part of those who had preceded him as the representative of the government in this court, he desired respectfully to state, without saying more, that it was not his intention to argue it now.

STORY, J. I do not take the question to be settled by that case.

JOHNSON, J. I consider it to be settled by the authority of that case.

WASHINGTON, J. Whenever counsel can be found ready to argue it, I shall divest myself of all prejudice arising from that case.

LIVINGSTON, J. I am disposed to hear an argument on the point. This case was brought up for that purpose, but until the question is re-argued, the case of the United States *v.* Hudson and Goodwin must be taken as law.

JOHNSON, J., delivered the opinion of the Court.

Upon the question now before the court, a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed upon solemn argument. But the Attorney-General has declined to argue the cause, and no counsel appears for the defendant. Under these circumstances, the Court would not choose to review their former decision in the case of the United States *v.* Hudson and Goodwin, 7 C. 32, or draw it into doubt. They will therefore certify an opinion to the Circuit Court in conformity with that decision.

Certificate for the defendant.

UNITED STATES *v.* BEVANS,[1]

3 WHEATON, 336.

THE defendant, William Bevans, was indicted for murder in the Circuit Court for the District of Massachusetts. The indictment was founded on the 8th section of the act of Congress of the 30th of April, 1790, c. 9, and was tried upon the plea of not guilty. At the trial, it appeared in evidence that the offence charged in the indictment was committed by the prisoner on the 6th day of November, 1816, on board the United States ship of war Independence, rated a ship of the line of seventy-four guns, then in commission and in the actual service of the United States, under the command of Commodore Bainbridge. At the same time, William Bevans was a marine duly enlisted and in the service of the United States, and was acting as sentry, regularly posted on board of said ship, and Peter Leinstrum (the deceased, named in the indictment) was at the same time duly enlisted and in the service of the United States as cook's mate on board of said ship. The said ship was at the same time lying at anchor in the main channel

[1] See also United States *v.* Wiltberger, 5 Wheaton, 76.

of Boston harbor, in waters of a sufficient depth at all times of tide for ships of the largest class and burden, and to which there is at all times a free and unobstructed passage to the open sea or ocean. The nearest land at low-water mark to the position where the said ship then lay, on various sides, is as follows, namely: The end of the long wharf, so called, in the town of Boston, bearing southwest by south half south at the distance of half a mile; the western point of Williams's Island, bearing north by west, at the distance between one quarter and one third of a mile; the navy-yard of the United States at Charlestown, bearing northwest half west, at the distance of three quarters of a mile; and Dorchester Point, so called, bearing south southeast, at the distance of two miles and one quarter, and the nearest point of Governor's Island, so called (ceded to the United States), bearing southeast half east, at the distance of one mile and three quarters. To and beyond the position or place thus described, the civil and criminal processes of the courts of the State of Massachusetts have hitherto constantly been served and obeyed. The prisoner was first apprehended for the offence in the district of Massachusetts.

The jury found a verdict that the prisoner, William Bevans, was guilty of the offence as charged in the indictment.

Upon the foregoing statement of facts, which was stated and made under the direction of the Court, the prisoner, by his counsel, after verdict, moved for a new trial; upon which motion two questions occurred, which also occurred at the trial of the prisoner. 1st. Whether, upon the foregoing statement of facts, the offence charged in the indictment and committed on board the said ship as aforesaid was within the jurisdiction of the State of Massachusetts, or of any court thereof. 2d. Whether the offence charged in the indictment and committed on board the said ship as aforesaid was within the jurisdiction or cognizance of the Circuit Court of the United States for the District of Massachusetts. Upon which questions, the judges of the said Circuit Court were, at the trial and upon the motion for a new trial, opposed in opinion; and thereupon, upon the request of the district-attorney of the United States, the same questions were ordered by the said court to be certified under the seal of the court to the Supreme Court, to be finally decided.

Webster, for the defendant.

The *Attorney-General* and *Wheaton*, contra.

MARSHALL, C. J., delivered the opinion of the Court.

The question proposed by the Circuit Court, which will be first considered, is, —

Whether the offence charged in this indictment was, according to the statement of facts which accompanies the question, "within the

jurisdiction or cognizance of the Circuit Court of the United States for the District of Massachusetts."

The indictment appears to be founded on the 8th section of the "Act for the punishment of certain crimes against the United States." That section gives the courts of the Union cognizance of certain offences committed on the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State.

Whatever may be the constitutional power of Congress, it is clear that this power has not been so exercised, in this section of the act, as to confer on its courts jurisdiction over any offence committed in a river, haven, basin, or bay, which river, basin, or bay is within the jurisdiction of any particular State.

What, then, is the extent of jurisdiction which a State possesses?

We answer without hesitation, the jurisdiction of a State is co-extensive with its territory, co-extensive with its legislative power.

The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States.

It is contended to have been ceded by that article in the constitution which declares that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." The argument is, that the power thus granted is conclusive; and that the murder committed by the prisoner is a case of admiralty and maritime jurisdiction.

Let this be admitted. It proves the power of Congress to legislate in the case; not that Congress has exercised that power. It has been argued, and the argument in favor of as well as that against the proposition deserves great consideration, that courts of common law have concurrent jurisdiction with courts of admiralty over murder committed in bays which are inclosed parts of the sea; and that for this reason the offence is within the jurisdiction of Massachusetts. But in construing the act of Congress, the Court believes it to be unnecessary to pursue the investigation which has been so well made at the bar respecting the jurisdiction of these rival courts.

To bring the offence within the jurisdiction of the courts of the Union it must have been committed in a river, etc., out of the jurisdiction of any State. It is not the offence committed, but the bay in which it is committed, which must be out of the jurisdiction of the State. If then it should be true that Massachusetts can take no cognizance of the offence, yet unless the place itself be out of her jurisdiction, Congress has not given cognizance of that offence to its courts. If there be a common jurisdiction, the crime cannot be punished in the courts of the Union.

Can the cession of all cases of admiralty and maritime jurisdiction

be construed into a cession of the waters on which those cases may arise?

This is a question on which the Court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

It is observable that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the States. It is difficult to compare the two sections together without feeling a conviction, not to be strengthened by any commentary on them, that in describing the judicial power the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction have divested Massachusetts of the power to regulate the trade of her bay? As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water when the tide flows and fight a duel, are they not within the jurisdiction, and punishable by the laws, of Massachusetts? If these questions must be answered in the affirmative, and we believe they must, then the bay in which this murder was committed is not out of the jurisdiction of a State, and the Circuit Court of Massachusetts is not authorized, by the section under consideration, to take cognizance of the murder which has been committed.

It may be deemed within the scope of the question certified to this Court to inquire whether any other part of the act has given cognizance of this murder to the Circuit Court of Massachusetts.

The 3d section enacts "that if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place, or

district of country under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death."

Although the bay on which this murder was committed might not be out of the jurisdiction of Massachusetts, the ship of war on the deck of which it was committed, is, it has been said, "a place within the sole and exclusive jurisdiction of the United States," whose courts may consequently take cognizance of the offence.

That a government which possesses the broad power of war, which "may provide and maintain a navy," which "may make rules for the government and regulation of the land and naval forces," has power to punish an offence committed by a marine, on board a ship of war, wherever that ship may lie, is a proposition never to be questioned in this court. On this section, as on the 8th, the inquiry respects not the extent of the power of Congress, but the extent to which that power has been exercised.

The objects with which the word "place" is associated are all, in their nature, fixed and territorial. A fort, an arsenal, a dock-yard, a magazine, are all of this character. When the sentence proceeds with the words, "or in any other place or district of country under the sole and exclusive jurisdiction of the United States," the construction seems irresistible, that by the words "other place" was intended another place of a similar character with those previously enumerated and with that which follows. Congress might have omitted, in its enumeration, some similar place within its exclusive jurisdiction, which was not comprehended by any of the terms employed, to which some other name might be given; and therefore the words "other place" or "district of country" were added; but the context shows the mind of the legislature to have been fixed on territorial objects of a similar character.

This construction is strengthened by the fact, that at the time of passing this law, the United States did not possess a single ship of war. It may therefore be reasonably supposed that a provision for the punishment of crimes in the navy might be postponed until some provision for a navy should be made. While taking this view of the subject, it is not entirely unworthy of remark, that afterwards, when a navy was created and Congress did proceed to make rules for its regulation and government, no jurisdiction is given to the courts of the United States, of any crime committed in a ship of war, wherever it may be stationed. Upon these reasons the court is of opinion that a murder committed on board a ship of war, lying within the harbor of Boston, is not cognizable in the Circuit Court for the District of Massachusetts; which opinion is to be certified to the Court.

The opinion of the Court on this point is believed to render it unnecessary to decide the question respecting the jurisdiction of the State court in that case. *Certificate accordingly.*

Section 2. Express Adoption of a Body of Local Law, Including its Common Law.

An Act for establishing the temporary and permanent seat of the Government of the United States. (*July* 16, 1790.)

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby accepted for the permanent seat of the government of the United States. Provided nevertheless, That the operation of the laws of the State within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.

An Act concerning the District of Columbia. (*Feb.* 27, 1801.)

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said State to the United States, and by them accepted for the permanent seat of government; and that the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that State to the United States, and by them accepted as aforesaid.[1]

Section 3. Tacit Adoption of the Common Law by Reference.

UNITED STATES *v.* CARLL,

105 U. S. 611 [1881].

Certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York.

This was an indictment, found in the Circuit Court, on section 5431

[1] See Rhodes *v.* Bell, 2 How. 397.

of the Revised Statutes, by which it is enacted that "every person who, with intent to defraud, passes, utters, publishes, or sells any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor not more than fifteen years."

Each count of the indictment alleged that the defendant, at a certain time and place, "feloniously, and with intent to defraud the Bank of the Metropolis, which said bank is a corporation organized under the laws of the State of New York, did pass, utter, and publish upon and to the said Bank of the Metropolis a falsely made, forged, counterfeited, and altered obligation and security of the United States" (which was set forth according to its tenor), against the peace and contrary to the form of the statute.

The defendant, having been tried before Judge Benedict, and convicted by the jury under instructions which required them to be satisfied of the facts alleged and that the defendant, at the time of uttering the obligations, knew them to be false, forged, counterfeited, and altered, moved in arrest of judgment for the insufficiency of the indictment. At the hearing of this motion before Judge Blatchford and Judge Benedict, they were divided in opinion upon the question, stated in various forms in their certificate, but in substance this: Whether the indictment, setting forth the offence in the language of the statute, without further alleging that the defendant knew the instruments to be false, forged, counterfeited, and altered, was sufficient, after verdict, to warrant judgment thereon.

The Solicitor-General for the United States.

Mr. William C. Roberts for the defendant.

Mr. Justice Gray, after stating the case, delivered the opinion of the Court.

In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. United States *v.* Cruikshank, 92 U. S. 542; United States *v.* Simmons, 96 id. 360; Commonwealth *v.* Clifford, 8 Cush. (Mass.) 215; Commonwealth *v.* Bean, 11 id. 414; Commonwealth *v.* Bean, 14 Gray (Mass.), 52; Commonwealth *v.* Filburn, 119 Mass. 297.

The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offence at which it is aimed is similar to the common-law offence of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

This indictment, by omitting the allegation contained in the indictment in United States *v.* Howell (11 Wall. 432), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a "defect or imperfection in matter of form only," within the meaning of section 1025 of the Revised Statutes. By the settled rules of criminal pleading and the authorities above cited, therefore, the question of the sufficiency of the indictment must be *Answered in the negative.*

Section 4. Summary Constitutional and Statutory Adoption of Principles of Law of Admiralty.

"The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." — Constitution of the United States, Art. III., § 2.

UNITED STATES *v.* COOMBS,[1]

12 Pet. 72 [1838].

The case is stated in the opinion of the Court.

Butler (Attorney-General), for the United States.

No counsel *contra.*

Story, J., delivered the opinion of the Court.

This is a case certified upon a division of opinion of the judges of the Circuit Court for the Southern District of New York. The case as stated in the record is as follows: —

Lawrence Coombs was indicted under the 9th section of the act entitled "An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved

[1] See United States *v.* Bevans, above.

the 3d of March, 1825, for having, on the 21st of November, 1836, feloniously stolen at Rockaway Beach, in the Southern District of New York, one trunk of the value of five dollars, one package of yarn of the value of five dollars, one package of silk of the value of five dollars, one roll of ribbons of the value of five dollars, one package of muslin of the value of five dollars, and six pairs of hose of the value of five dollars, which said goods, wares, and merchandise belonged to the ship Bristol, the said ship then being in distress, and cast away on a shoal of the sea, on the coast of the State of New York, within the Southern District of New York. On this indictment the prisoner was arraigned, and plead not guilty, and put himself upon his country for trial.

It was admitted that the goods mentioned in the indictment, and which belonged to the said ship Bristol, were taken above high-water mark, upon the beach, in the County of Queens; whereupon the question arose whether the offence committed was within the jurisdiction of the court, and on this point the judges were opposed in opinion.

Which said point, upon which the disagreement has happened, is stated above, under the direction of the judges of said court, at the request of the counsel for the United States and Lawrence Coombs, parties in the cause, and ordered to be certified unto the Supreme Court at the next session, pursuant to the act in such case made and provided.

The 9th section of the Act of 1825, c. 276, on which the indictment in the present case is founded, is in the following words: "That if any person shall plunder, steal, or destroy any money, goods, merchandise, or other effects from, or belonging to, any ship or vessel, or boat or raft which shall be in distress, or which shall be wrecked, lost, stranded, or cast away upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any place within the admiralty or maritime jurisdiction of the United States; or if any person or persons shall wilfully obstruct the escape of any person endeavoring to save his or her life from such ship or vessel, boat or raft, or the wreck thereof; or if any person shall hold out or show any false light or lights, or extinguish any true light, with intention to bring any ship or vessel, boat or raft, being or sailing upon the sea, into danger or distress or shipwreck; every person so offending, his or their counsellors, aiders, or abettors, shall be deemed guilty of felony; and shall on conviction thereof, be punished by a fine, not exceeding $5,000 and imprisonment and confinement at hard labor, not exceeding ten years, according to the aggravation of the offence." 3 Story's Laws of the U. S. 2,001. The indictment, as has been already stated, charges the offence to have been committed on Rockaway Beach, and as is admitted above high-water mark.

Before we proceed to the direct consideration of the true import and interpretation of this section, it seems highly important, if not indis-

pensable, to say a few words as to the constitutional authority of Congress to pass the same.

. . . . . .

There are two clauses of the Constitution which may properly come under review in examining the constitutional authority of Congress over the subject-matter of the section. One is the delegation of the judicial power, which is declared to extend "to all cases of admiralty and maritime jurisdiction." The other is the delegation of the power "to regulate commerce with foreign nations, and among the several States," and, as connected with these, the power to make all laws which shall be necessary and proper for carrying into execution the foregoing power, etc.

In regard to the first clause, the question which arises is, What is the true nature and extent of the admiralty jurisdiction? Does it, in cases where it is dependent upon locality, reach beyond high-water mark? Our opinion is, that in cases purely dependent upon the locality of the act done, it is limited to the sea and to tide-waters as far as the tide flows, and that it does not reach beyond high-water mark. It is the doctrine which has been repeatedly asserted by this court, and we see no reason to depart from it. Mixed cases may arise, and indeed often do arise, where the acts and services done are of a mixed nature, as where salvage services are performed partly on tide-waters and partly on the shore, for the preservation of the property saved, in which the admiralty jurisdiction has been constantly exercised to the extent of decreeing salvage. That this is a rightful exercise of jurisdiction by our Courts of Admiralty was assumed as the basis of much of the reasoning of this court in the case of the American Insurance Company *v.* Canter, 1 Pet. 511. It has also been asserted and enforced by Lord Stowell on various occasions, and especially in the case of The Augusta or Eugenie, 1 Hagg. Adm. Rep. 16; The Jonge Nicholas, 1 Hagg. Adm. Rep. 201; The Ranger, 2 Hagg. Adm. Rep. 42; and The Happy Return, 2 Hagg. Adm. Rep. 198. See also, The Henry, of Philadelphia, 1 Hagg. Adm. Rep. 264; The Vesta, 2 Hagg. Adm. Rep. 189; The Salecia, 2 Hagg. Adm. Rep. 262. And this has been done, not only in conformity to the doctrines of the maritime law, but also to what has been held in the courts of common law. For it has been laid down that if the libel is founded upon one single continued act, which was principally upon the sea, though a part was upon land; as if the mast of a ship be taken upon the sea, though it be afterwards brought ashore, no prohibition lies. Com. Dig. Adm. F. S.; 1 Rolle's Adm. 533, C. 13; Com. Dig. Adm. E. 12. It is true that it has been said that the admiralty has not jurisdiction of the wreck of the sea. 3 Black. Com. 106, 107. But we are to understand by this, not what in

the sense of the maritime and commercial law is deemed wreck or shipwrecked property, but "wreck of the sea" in the purely technical sense of the common law, and constituting a royal franchise and a part of the revenue of the Crown in England, and often granted as such a royal franchise to lords of manors. How narrow and circumscribed this sort of wreck is, according to the modern doctrines of the courts of common law, may be perceived by the statement of it in Mr. Justice Blackstone's Commentaries (1 Black. Com. 290 to 317), who also shows that it is this and this only which is excluded from the admiralty jurisdiction. Lord Stowell manifestly acted upon the same doctrine in the case of The Augusta or Eugenie, 1 Hagg. Adm. Rep. 16; 3 Black. Com. 106, 107.

. . . . . .

In our judgment the authority of Congress under this clause of the Constitution does not extend to punish offences committed above and beyond high-water mark.

But we are of opinion that under the clause of the Constitution giving power to Congress "to regulate commerce with foreign nations and among the several States," Congress possessed the power to punish offences of the sort which are enumerated in the 9th section of the Act of 1825 now under consideration. The power to regulate commerce includes the power to regulate navigation as connected with the commerce of foreign nations and among the States. It was so held and decided by this court, after the most deliberate consideration, in the case of Gibbons *v.* Ogden, 9 Wheat. 189–198. It does not stop at the mere boundary line of a State, nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the States. Any offence which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. No one can doubt that the various offences enumerated in the 9th section of the Act are all of a nature which tend essentially to obstruct, prevent, or destroy the due operations of commerce and navigation with foreign nations and among the several States.

. . . . . .

Upon the whole our opinion is that it be certified to the Circuit Court for the Southern District of New York that the offence committed was within the jurisdiction of that court.

Section 5. Summary Adoption in Whole or in Part of Other Existing Systems of Law. (Law of Nations.)

"The Congress shall have power . . . to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." — Constitution of the United States, Art. I. § 8.

UNITED STATES *v.* SMITH,

5 Wheaton, 153 [1820].

This was an indictment for piracy against the prisoner, Thomas Smith, before the Circuit Court of Virginia, on the Act of Congress of the 3d of March, 1819 (3 Stats. at Large, 513).

The jury found a special verdict, as follows: "We, of the jury, find that the prisoner, Thomas Smith, in the month of March, 1819, and others were part of the crew of a private armed vessel, called 'The Creollo' (commissioned by the government of Buenos Ayres, a colony then at war with Spain), and lying in the port of Margaritta; that in the month of March, 1819, the said prisoner and others of the crew mutinied, confined their officer, left the vessel, and in the said port of Margaritta seized by violence a vessel called 'The Irresistible,' a private armed vessel lying in that port, commissioned by the government of Artigas, who was also at war with Spain; that the said prisoner and others, having so possessed themselves of the said vessel 'The Irresistible,' appointed their officers, proceeded to sea on a cruise, without any documents or commission whatever, and while on that cruise, in the month of April, 1819, on the high seas, committed the offence charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned. If the plunder and robbery aforesaid be piracy under the act of the Congress of the United States, entitled 'An Act to protect the commerce of the United States, and punish the crime of piracy,' then we find the said prisoner guilty; if the plunder and robbery above stated be not piracy under the said act of Congress, then we find him not guilty."

The Circuit Court divided on the question whether this be piracy as defined by the law of nations, so as to be punishable under the Act of Congress of the 3d of March, 1819, and thereupon the question was certified to this court for its decision.

The *Attorney-General*, for the United States.

Webster, contra.

STORY, J., delivered the opinion of the Court.

The act of Congress upon which this indictment is founded provides, "That if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, etc., be punished with death."

The first point made at the bar is whether this enactment be a constitutional exercise of the authority delegated to Congress upon the subject of piracies. The Constitution declares that Congress shall have power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The argument which has been urged in behalf of the prisoner is, that Congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the 8th section of the Act of Congress of 1790, c. 9, which declares that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the Constitution.

In our judgment, the construction contended for proceeds upon too narrow a view of the language of the Constitution. The power given to Congress is not merely "to define and punish piracies;" if it were, the words "to define" would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. And it has been very justly observed, in a celebrated commentary, that the definition of piracies might have been left without inconvenience to the law of nations, though a legislative definition of them is to be found in most municipal codes. The Federalist, No. 42, p. 276. But the power is also given "to define and punish felonies on the high seas, and offences against the law of nations." The term "felonies" has been supposed, in the same work not to have a very exact and determinate meaning in relation to offences at the common law committed within the body of a county. However this may be, in relation to offences on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law. See 3 Inst. 112; Hawk. P. C. c. 37; Moore, 576. Offences too against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect therefore as well to felonies on the high seas as to offences against the law of nations,

there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.

But supposing Congress were bound, in all the cases included in the clause under consideration, to define the offence, still there is nothing which restricts it to a mere logical enumeration, in detail, of all the facts constituting the offence. Congress may as well define by using a term of a known and determinate meaning as by an express enumeration of all the particulars included in that term. That is certain which is by necessary reference made certain. When the Act of 1790 declares that any person who shall commit the crime of robbery or murder on the high seas shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the offence, even if the common-law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the Constitution is therefore wholly inadmissible. To define piracies, in the sense of the Constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted.

It is next to be considered whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law. There is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law in terms that admit of no reasonable doubt. The common law too recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations (which is part of the common law); as an offence against the

universal law of society, a pirate being deemed an enemy of the human race. Indeed until the statute of 28th of Henry VIII., c. 15, piracy was punishable in England only in the admiralty as a civil-law offence; and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offence. Hawk. P. C. c. 37, § 2; 3 Inst. 112. Sir Charles Hedges, in his charge at the admiralty sessions, in the case of Rex v. Dawson, 5 State Trials, declared in emphatic terms that "piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty." Sir Leoline Jenkins too, on a like occasion, declared that "a robbery when committed upon the sea is what we call piracy," and he cited the civil-law writers in proof. And it is manifest, from the language of Sir William Blackstone, 4 Bl. Comm. 73, in his comments on piracy, that he considered the common-law definition as distinguishable in no essential respect from that of the law of nations. So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have therefore no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the 5th section of the Act of 1819.

Another point has been made in this case, which is that the special verdict does not contain sufficient facts upon which the Court can pronounce that the prisoner is guilty of piracy. We are of a different opinion. The special verdict finds that the prisoner is guilty of the plunder and robbery charged in the indictment; and finds certain additional facts from which it is most manifest that he and his associates were, at the time of committing the offence, freebooters upon the sea, not under the acknowledged authority or deriving protection from the flag or commission of any government. If under such circumstances the offence be not piracy, it is difficult to conceive any which would more completely fit the definition.

It is to be certified to the Circuit Court that upon the facts stated the case is piracy, as defined by the law of nations, so as to be punishable under the Act of Congress of the 3d of March, 1819.[1]

[1] Livingston, J., delivered a dissenting opinion.

UNITED STATES *v.* ARJONA,

120 U. S. 479 [1887].

INDICTMENT under the Act of May 16, 1884, 23 Stat. 22, to prevent and punish the counterfeiting within the United States of notes, bonds, and other securities of foreign governments. The court below certified a division in opinion on several points. The case is stated in the opinion of the Court.

Mr. Attorney-General for plaintiff.

Mr. George W. Wingate and *Mr. Augustus A. Levey* for defendant.

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court.

This is an indictment containing three counts against Ramon Arjona, for violations of §§ 3 and 6 of the Act of May 16, 1884, c. 52, 23 Stat. 22, "to prevent and punish the counterfeiting within the United States of notes, bonds, and other securities of foreign governments." The first and second counts were found under § 6 of the statute, and the third under § 3.

The statute makes the following things criminal: —

1. SECT. 1. Forging or counterfeiting within the United States, with intent to defraud, "any bond, certificate, obligation, or other security of any foreign government, issued or put forth under the authority of such foreign government, or any treasury note, bill, or promise to pay issued by such foreign government, and intended to circulate as money either by law, order, or decree of such foreign government."

2. SECT. 2. Knowingly, and with intent to defraud, uttering, passing or putting off in payment or negotiation, within the United States, any forged or counterfeit bonds, &c., such as are described in § 1.

3. SECT. 3. Falsely making, forging or counterfeiting within the United States, with intent to defraud, or knowingly assisting therein, "any bank-note or bill issued by a bank or other corporation of any foreign country, and intended by the law or usage of such foreign country to circulate as money, such bank or corporation being authorized by the laws of such country."

4. SECT. 4. Knowingly uttering, passing, putting off or tendering in payment, within the United States, with intent to defraud, any such false or counterfeited bank-note or bill as is mentioned in § 3, whether forged or counterfeited in the United States or not.

5. SECT. 5. Having in possession any forged or counterfeit instruments mentioned in the preceding sections, with intent to utter, pass, or put them off, or to deliver them to others, with the intent that they may be uttered or passed.

6. SECT. 6. Having in possession "any plate, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obliga-

tion, or other security, in whole or in part, of any foreign government, bank, or corporation, except by lawful authority; " or using such plate, or knowingly permitting or suffering " the same to be used, in counterfeiting such foreign obligations, or any part thereof; " or engraving, or causing or procuring to be engraved, or assisting " in engraving, any plate in the likeness or similitude of any plate designed for the printing of the genuine issues of the obligations of any foreign government, bank, or corporation; or printing, photographing, or in any other manner making, executing, or selling, or causing " to be printed, photographed, made, executed, or sold," or aiding " in printing, photographing, making, executing, or selling any engraving, photograph, print, or impression in the likeness of any genuine note, bond, obligation, or other security, or any part thereof, of any foreign government, bank, or corporation; " or bringing " into the United States . . . any counterfeit plate, engraving, photograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign government, bank, or corporation."

The first count of the indictment charges Arjona with having " in his control and custody a certain metallic plate from which there might then and there be printed in part a counterfeit note in the likeness and similitude in part of the notes theretofore issued by a foreign bank, to wit, the bank known as El Banco del Estado de Bolivar, which said bank was then and there a bank authorized by the laws of a foreign State, to wit, the State of Bolivar, said State being then and there one of the States of the United States of Columbia."

In the second count he is charged with having caused and procured " to be engraved a certain metallic plate in the likeness and similitude of a plate designated for the printing of the genuine issues of the obligations of a foreign bank, that is to say, of the bank-notes of the bank known as El Banco del Estado de Bolivar, the same being then and there a bank authorized by the laws of a foreign State, to wit, the State of Bolivar, said State being then and there one of the States of the United States of Columbia."

In the third count, the charge is that he, " unlawfully and with intent to defraud, did cause and procure to be falsely made a certain note in the similitude and resemblance of the notes theretofore issued by a bank of a foreign country, to wit, the bank known as El Banco del Estado de Bolivar, the same being then and there a bank authorized by the laws of one of the States of the United States of Columbia, that is to say, the State of Bolivar, and the notes issued by the said bank being then and by the usage of the said State of Bolivar intended to circulate as money."

To this indictment a demurrer was filed, and the judges holding the court have certified that at the hearing the following questions arose, upon which their opinions were opposed: —

1. Whether the third section of the statute is constitutional.

2. Whether the sixth section is constitutional so far as it relates to "foreign banks and corporations."

3. Whether the counterfeiting within the United States of the notes of a foreign bank or corporation can be constitutionally made by Congress an offence against the law of nations.

4. Whether the obligations of the law of nations, as referred to in the Constitution of the United States, include the punishment of counterfeiting the notes of a foreign bank or corporation, or of having in possession a plate from which may be printed counterfeits of the notes of foreign banks or corporations, as mentioned in the third and sixth sections, "unless it appear or is alleged in the indictment that the notes of said foreign bank or corporation are the notes or money of issue of a foreign government, prince, potentate, State, or power."

5. Whether, if there is power to "so define the law of nations," as to include the offences mentioned in the third and sixth sections, it is not necessary, in order "to define" the offence, that it be declared in the statute itself "to be an offence against the law of nations."

6. Whether the indictment is sufficient in law.

The fourth of the questions thus stated embraces the fourth, fifth, sixth, seventh, and eighth of those certified, and the fifth embraces the ninth and tenth.

Congress has power to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, Art. I., § 8, clause 18; and the Government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. It alone can "regulate commerce with foreign nations," Art. I., § 8, clause 3; make treaties and appoint ambassadors and other public ministers and consuls. Art. II., § 2, clause 2. A State is expressly prohibited from entering into any "treaty, alliance, or confederation." Art. I., § 10, clause 1. Thus all official intercourse between a State and foreign nations is prevented, and exclusive authority for that purpose given to the United States. The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations; and because of this, Congress is expressly authorized "to define and punish . . . . offences against the law of nations." Art. I., § 8, clause 10.

The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within

its own jurisdiction counterfeit the money of another nation has long been recognized. Vattel, in his Law of Nations, which was first printed at Neuchâtel in 1758 and was translated into English and published in England in 1760, uses this language: "From the principles thus laid down, it is easy to conclude that if one nation counterfeits the money of another, or if she allows and protects false coiners who presume to do it, she does that nation an injury."[1] When this was written, money was the chief thing of this kind that needed protection, but still it was added: "There is another custom more modern and of no less use to commerce than the establishment of coin, namely *exchange,* or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other at very trifling expense, and if he pleases, without risk. For the same reason that sovereigns are obliged to protect commerce, they are obliged to support this custom by good laws, in which every merchant, whether citizen or foreigner, may find security. In general, it is equally the interest and duty of every nation to have wise and equitable commercial laws established in the country."[2] Vattel, Law of Nations, Phil. ed. 1876, Book I., c. 10, pp. 46, 47. In a note by Mr. Chitty in his London edition of 1834, it is said: "This is a sound principle, which ought to be extended so as to deny effect to any fraud upon a foreign nation or its subjects." Id. 47, note 50.

This rule was established for the protection of nations in their intercourse with each other. If there were no such intercourse, it would be a matter of no special moment to one nation that its money was counterfeited in another. Its own people could not be defrauded if the false coin did not come among them, and its own sovereignty would not be violated if the counterfeit could not under any circumstances be made to take the place of the true money. But national intercourse includes commercial intercourse between the people of different nations. It is as much the duty of a nation to protect such an intercourse as it is any other, and that is what Vattel meant when he said, "For the same reason that sovereigns are obliged to protect commerce, they are obliged

[1] § 108. Des principes que nous venons d'établir il est aisé de conclure, que si une Nation contrefait la monnaie d'une autre, ou si elle souffre et protége les faux monnayeurs qui osent l'entreprendre, elle lui fait injure.

[2] Il est un autre usage plus moderne, et non moins utile au commerce que l'établissement de la monnaie: c'est le *change,* ou le négoce des banquiers, par le moyen duquel un marchand remet d'un bout du monde à l'autre des sommes immenses, presque sans frais, et s'il le veut, sans péril. Par la même raison que les souverains doivent protéger le commerce, ils sont obligés de soutenir cet usage par de bonnes lois, dans lesquelles tout marchand, étranger ou citoyen, puisse trouver sa sûreté. En général, il est également de l'intérêt et du devoir de toute Nation, d'établir chez elle de sages et justes lois de commerce.

to support this custom, . . . namely, *exchange*, or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other, . . . by good laws, in which every merchant, whether citizen or foreigner, may find security."

In the time of Vattel certificates of the public debt of a nation, government bonds, and other government securities were rarely seen in any other country than that in which they were put out. Banks of issue were not so common as to need special protection for themselves or the public against forgers and counterfeiters elsewhere than at home; and the great corporations, now so numerous and so important, established by public authority for the promotion of public enterprises, were almost unknown, and certainly they had not got to be extensive borrowers of money wherever it could be had at home or abroad on the faith of their *quasi*-public securities. Now, however, the amount of national and corporate debt and of corporate property represented by bonds, certificates, notes, bills, and other forms of commercial securities, which are bought and sold in all the money-markets of the world, both in and out of the country under whose authority they were created, is something enormous.

Such being the case, it is easy to see that the same principles that developed, when it became necessary, the rule of national conduct which was intended to prevent, as far as might be, the counterfeiting of the money of one nation within the dominion of another, and which in the opinion of so eminent a publicist as Vattel could be applied to the foreign exchange of bankers, may, with just propriety, be extended to the protection of this more recent custom among bankers of dealing in foreign securities, whether national or corporate, which have been put out under the sanction of public authority at home and sent abroad as the subjects of trade and commerce. And especially is this so of bank-notes and bank bills issued under the authority of law, which, from their very nature, enter into and form part of the circulating medium of exchange — the money — of a country. Under such circumstances, every nation has not only the right to require the protection, as far as possible, of its own credit abroad against fraud, but the banks and other great commercial corporations, which have been created within its own jurisdiction for the advancement of the public good, may call on it to see that their interests are not neglected by a foreign government to whose dominion they have, in the lawful prosecution of their business, become to some extent subjected.

No nation can be more interested in this question than the United States. Their money is practically composed of treasury notes or certificates issued by themselves, or of bank bills issued by banks created under their authority and subject to their control. Their own securi-

ties, and those of the States, the cities, and the public corporations whose interests abroad they alone have the power to guard against foreign national neglect, are found on sale in the principal money-markets of Europe. If these securities, whether national, municipal, or corporate, are forged and counterfeited with impunity at the places where they are sold, it is easy to see that a great wrong will be done to the United States and their people. Any uncertainty about the genuineness of the security necessarily depreciates its value as a merchantable commodity, and against this international comity requires that national protection shall, as far as possible, be afforded. If there is neglect in that, the United States may, with propriety, call on the proper government to provide for the punishment of such an offence, and thus secure the restraining influences of a fear of the consequences of wrong-doing. A refusal may not perhaps furnish sufficient cause for war, but it would certainly give just ground of complaint, and thus disturb that harmony between the governments which each is bound to cultivate and promote.

But if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other. A right secured by the law of nations to a nation or its people is one the United States as the representatives of this nation are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the States. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a State from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offence against the authority of a State as well as that of the United States.

Again, our own people may be dealers at home in the public or *quasi*-public securities of a foreign government, or of foreign banks or corporations, brought here in the course of our commerce with foreign nations, or sent here from abroad for sale in the money-markets of this country. As such they enter into and form part of the foreign commerce of the country. If such securities can be counterfeited here

with impunity, our own people may be made to suffer by a wrong done which affects a business that has been expressly placed by the Constitution under the protection of the government of the United States.

It remains only to consider those questions which present the point whether, in enacting a statute to define and punish an offence against the law of nations, it is necessary, in order "to define" the offence, that it be declared in the statute itself to be "an offence against the law of nations." This statute defines the offence, and if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offence against the law of nations. Such being the case, there is no more need of declaring in the statute that it is such an offence than there would be in any other criminal statute to declare that it was enacted to carry into execution any other particular power vested by the Constitution in the government of the United States. Whether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress. As has already been seen, it was incumbent on the United States as a nation to use due diligence to prevent any injury to another nation or its people by counterfeiting its money or its public or *quasi*-public securities. This statute was enacted as a means to that end, that is to say, as a means of performing a duty which had been cast on the United States by the law of nations, and it was clearly appropriate legislation for that purpose. Upon its face, therefore, it defines an offence against the law of nations as clearly as if Congress had in express terms so declared. Criminal statutes passed for enforcing and preserving the neutral relations of the United States with other nations were passed by Congress at a very early date; June 5, 1794, c. 50, 1 Stat. 381; June 14, 1797, c. 1, 1 Stat. 520; March 3, 1817, c. 58, 3 Stat. 370; April 20, 1818, c. 88, 3 Stat. 447: and those now in force are found in Title LXVII. of the Revised Statutes. These all rest on the same power of Congress that is here invoked, and it has never been supposed they were invalid because they did not expressly declare that the offences there defined were offences against the law of nations.

If there is anything more in the eleventh question certified than has been already disposed of in answering the others, it is too broad and indefinite for our consideration under the rules which have been long established regulating the practice on a certificate of division.

All the questions certified, except the eleventh, are answered in the affirmative, and as to that, no special answer will be made.

SECTION 5. FEDERAL JURISDICTION BY LOCALITY; CEDED PLACES; PLACES PURCHASED BY CONSENT OF STATE; PLACES PURCHASED WITHOUT CONSENT OF STATE; PLACES RETAINED ON CREATION OF STATE; EXCLUSIVE OR CONCURRENT JURISDICTION.

CHICAGO &c., RY. CO. *v.* McGLINN,

114 U. S. 542 [1884].

THIS was an action brought by the defendant in error as plaintiff to recover the value of a cow killed by the engine and cars of the plaintiff in error. Judgment for the plaintiff, which was affirmed by the Supreme Court. The facts which raise the Federal question are stated in the opinion of the Court.

This case comes here from the Supreme Court of the State of Kansas. It is an action for the value of a cow alleged to have been killed by the engine and cars of the Chicago, Rock Island, and Pacific Railway Company, a corporation doing business in the County of Leavenworth in that State. It was brought in a State district court, and submitted for decision upon an agreed statement of facts, in substance as follows: That on the 10th of February, 1881, a cow, the property of the plaintiff, of the value of $25, strayed upon the railroad of the defendant at a point within the limits of the Fort Leavenworth Military Reservation in that county and State, where the road was not enclosed with a fence, and was there struck and killed by a train passing along the road; that the Reservation is the one referred to in the act of the legislature of the State of February 22, 1875; that a demand upon the defendant for the $25 was made by the plaintiff more than thirty days before the action was brought; and that, if the plaintiff was entitled to recover attorney's fees, $20 would be a reasonable fee.

The action was founded upon a statute of Kansas of March 9, 1874, entitled "An Act relating to killing or wounding stock by railroads," which makes every railway company in the State liable to the owner for the full value of cattle killed, and in damages for cattle wounded, by its engine or cars, or in any other manner in operating its railway. It provides that, in case the railway company fails for thirty days after demand by the owner to pay to him the full value of the animal killed or damages for the animal wounded, he may sue and recover the same, together with a reasonable attorney's fee for the prosecution of the action. It further provides that it shall not apply to any railway company the road of which is enclosed with a good and lawful fence to prevent the animal from being on the road. Laws of Kansas, 1874, c. 94.

On the 22d of February, 1875, the legislature of Kansas passed an act ceding to the United States jurisdiction over the Reservation, the first section of which is as follows: "That exclusive jurisdiction be, and the same is hereby, ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States Military Reservation, known as the Fort Leavenworth Reservation, in said State, as declared from time to time by the President of the United States; saving, however, to the said State the right to serve civil or criminal process within said Reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of such cession and Reservation; and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises, and property on said Reservation." Laws of Kansas, 1875, c. 66.

The district court gave judgment for the plaintiff, assessing his damages at $45, an amount which was made by estimating the value of the cow killed at $25 and the attorney's fee at $20, these sums having been agreed upon by the parties. The case was carried to the Supreme Court of the State, where the judgment was affirmed, that court holding that the act of Kansas relating to the killing or wounding of stock by railroads continued to be operative within the limits of the Reservation, as it had not been abrogated by Congress and was not inconsistent with existing laws of the United States. In so holding, the court assumed, for the purposes of the case, without however admitting the fact, that the act ceding jurisdiction to the United States over the Reservation was valid, and that the United States had legally accepted the cession. To review this judgment the case is brought here.

Two questions are presented for our determination: one, whether the act of Kansas purporting to cede to the United States exclusive jurisdiction over the Reservation is a valid cession within the requirements of the Constitution; the other, if such cession of jurisdiction is valid, did the act of Kansas relating to the killing or wounding of stock by railroads continue in force afterwards within the limits of the Reservation?

It can hardly be the design of counsel for the railroad company to contend that the act of cession to the United States is wholly invalid, for in that event the jurisdiction of the State would remain unimpaired, and her statute would be enforceable within the limits of the Reservation equally as in any other part of the State. What we suppose counsel desires to maintain is, that the act of cession confers exclusive jurisdiction over the territory, and that any limitations upon it in the act must therefore be rejected as repugnant to the grant.

This point was involved in the case of Fort Leavenworth Railroad *v.* Lowe, 114 U. S. 525. We there held that a building on a tract of land owned by the United States used as a fort, or for other public purposes of the Federal government, is exempted, as an instrumentality of the government, from any such control or interference by the State as will defeat or embarrass its effective use for those purposes. But in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the State. This is the only mode prescribed by the Federal Constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended. We also held that it is competent for the legislature of a State to cede exclusive jurisdiction over places needed by the general government in the execution of its powers, the use of the places being, in fact, as much for the people of the State as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes.

Upon the second question the contention of the railroad company is that the act of Kansas became inoperative within the Reservation upon the cession to the United States of exclusive jurisdiction over it. We are clear that this contention cannot be maintained. It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power — and the latter is involved in the former — to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by ex-

isting laws of the new government upon the same matters. But with respect to other laws, affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. American Insurance Co. *v.* Canter, 1 Pet. 542; Halleck, International Law, c. 34, § 14.

The counsel for the railroad company does not controvert this general rule in cases of cession of political jurisdiction by one nation to another, but contends that it has no application to a mere cession of jurisdiction over a small piece of territory having no organized government or municipality within its limits; and argues upon the assumption that there was no organized government within the limits of Fort Leavenworth. In this assumption he is mistaken. The government of the State of Kansas extended over the Reservation, and its legislation was operative therein, except so far as the use of the land as an instrumentality of the general government may have excepted it from such legislation. In other respects the law of the State prevailed. There was a railroad running through it when the State ceded jurisdiction to the United States. The law of the State, making the railroad liable for killing or wounding cattle by its cars and engines where it had no fence to keep such cattle off the road, was as necessary to the safety of cattle after the cession as before, and was no more abrogated by the mere fact of cession than regulations as to the crossing of highways by the railroad cars and the ringing of bells as a warning to others of their approach.

It is true there is a wide difference between a cession of political jurisdiction from one nation to another and a cession to the United States by a State of legislative power over a particular tract, for a special purpose of the general government; but the principle which controls as to laws in existence at the time is the same in both. The liability of the railroad company for the killing of the cow did not depend upon the place where the animal was killed, but upon the neglect of the company to enclose the road with a fence which would have prevented the cow from straying upon it. The law of Kansas on the subject, in our opinion, remained in force after the cession, it being in no respect inconsistent with any law of the United States, and never having been changed or abrogated. The judgment is accordingly

Affirmed.

[1] See Ft. Leavenworth R. R. Co. *v.* Lowe, 114 U. S. 525.

SECTION 7. FEDERAL JURISDICTION BY LOCALITY. TERRITORIES; DELEGATION OF LEGISLATIVE POWERS.

AMERICAN INSURANCE COMPANY *v.* CANTER.

1 PET. 611 [1828].

THE case is stated in the opinion of the Court.

MARSHALL, C. J., delivered the opinion of the Court.

The plaintiffs filed their libel in this cause in the District Court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship "Point à Petre," which had been insured by them on a voyage from New Orleans to Havre de Grace in France. The "Point à Petre" was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold for the purpose of satisfying the salvors, by virtue of a decree of a court consisting of a notary and five jurors, which was erected by an act of the territorial legislature of Florida. The owners abandoned to the underwriters, who having accepted the same, proceeded against the property, alleging that the sale was not made by order of a court competent to change the property.

David Canter claimed the cotton as a *bona fide* purchaser, under the decree of a competent court, which awarded seventy-six per cent to the salvors on the value of the property saved.

The district judge pronounced the decree of the territorial court a nullity, and awarded restitution to the libellants of such part of the cargo as he supposed to be identified by the evidence, deducting therefrom a salvage of fifty per cent.

The libellants and claimant both appealed. The Circuit Court reversed the decree of the District Court, and decreed the whole cotton to the claimant, with costs, on the ground that the proceedings of the court at Key West were legal, and transferred the property to the purchaser.

From this decree the libellants have appealed to this court.

The cause depends mainly on the question whether the property in the cargo saved was changed by the sale at Key West. The conformity of that sale to the order under which it was made has not been controverted. Its validity has been denied on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That act purports to give the power which has been exercised; conse-

quently the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law which may be denominated political is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: "The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress in 1822 passed "an act for the establishment of a territorial government in Florida," and on the 3d of March, 1823, passed another act to amend the Act of 1822. Under this act, the territorial legislature enacted the law now under consideration.

The 5th section of the Act of 1823 creates a territorial legislature which shall have legislative powers over all rightful objects of legislation; but no law shall be valid which is inconsistent with the laws and Constitution of the United States.

The 7th section enacts "that the judicial power shall be vested in two superior courts and in such inferior courts and justices of the peace as the legislative council of the territory may from time to time establish." After prescribing the place of cession and the jurisdictional limits of each court, the Act proceeds to say: "Within its limits herein described, each court shall have jurisdiction in all criminal cases, and exclusive jurisdiction in all capital offences, and original jurisdiction in all civil cases of the value of one hundred dollars, arising under and cognizable by the laws of the territory now in force therein, or which may at any time be enacted by the legislative council thereof."

The 8th section enacts "that each of the said superior courts shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States, which, by an act to establish the judicial courts of the United States, approved the 24th of September, 1789, and an act in addition to the act entitled 'An Act to establish the judicial courts of the United States,' approved the 2d of March, 1793, was vested in the court of Kentucky district."

The powers of the territorial legislature extend to all rightful objects of legislation, subject to the restriction that their laws shall not be "inconsistent with the laws and Constitution of the United States." As salvage is admitted to come within this description, the Act is valid unless it can be brought within the restriction.

The counsel for the libellants contend that it is inconsistent with both the law and the Constitution; that it is inconsistent with the provisions of the law by which the territorial government was created and with the amendatory Act of March, 1823. It vests, they say, in an inferior

tribunal a jurisdiction which is, by those acts, vested exclusively in the superior courts of the territory.

This argument requires an attentive consideration of the sections which define the jurisdiction of the superior courts.

The 7th section of the Act of 1823 vests the whole judicial power of the territory "in two superior courts, and in such inferior courts and justices of the peace as the legislative council of the territory may from time to time establish." This general grant is common to the superior and inferior courts, and their jurisdiction is concurrent, except so far as it may be made exclusive in either by other provisions of the statute. The jurisdiction of the superior courts is declared to be exclusive over capital offences; on every other question over which those courts may take cognizance by virtue of this section, concurrent jurisdiction may be given to the inferior courts. Among these subjects are "all civil cases arising under and cognizable by the laws of the territory now in force therein, or which may at any time be enacted by the legislative council thereof."

It has been already stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognizes this principle by using the words "laws of the territory now in force therein." No laws could then have been in force but those enacted by the Spanish government. If among these a law existed on the subject of salvage, and it is scarcely possible there should not have been such a law, jurisdiction over cases arising under it was conferred on the superior courts, but that jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases on an inferior court, would not have been inconsistent with this section.

The 8th section extends the jurisdiction of the superior courts in terms which admit of more doubt. The words are: "That each of the said superior courts shall, moreover, have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States, which, by an act to establish the judicial courts of the United States, was vested in the court of the Kentucky district."

The 11th section of the Act declares "that the laws of the United States relating to the revenue and its collection, and all other public acts of the United States not inconsistent or repugnant to this Act, shall extend to and have full force and effect in the territory aforesaid."

The laws which are extended to the territory by this section were either for the punishment of crime or for civil purposes. Jurisdiction

is given in all criminal cases by the 7th section; but in civil cases that section gives jurisdiction only in those which arise under and are cognizable by the laws of the territory. Consequently all civil cases arising under the laws which are extended to the territory by the 11th section are cognizable in the territorial courts by virtue of the 8th section; and in those cases the superior courts may exercise the same jurisdiction as is exercised by the court for the Kentucky district.

The question suggested by this view of the subject, on which the case under consideration must depend, is this: —

Is the admiralty jurisdiction of the district courts of the United States vested in the superior courts of Florida, under the words of the 8th section, declaring that each of the said courts "shall, moreover, have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States," which was vested in the courts of the Kentucky district?

It is observable that this clause does not confer on the territorial courts all the jurisdiction which is vested in the court of the Kentucky district, but that part of it only which applies to "cases arising under the laws and Constitution of the United States." Is a case of admiralty of this description?

The Constitution and laws of the United States give jurisdiction to the district courts over all cases in admiralty; but jurisdiction over the case does not constitute the case itself. We are therefore to inquire whether cases in admiralty and cases arising under the laws and Constitution of the United States are identical.

If we have recourse to that pure fountain from which all the jurisdiction of the Federal courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.'

The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them in the Constitution is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not in fact arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise. It

is not then to the 8th section of the territorial law that we are to look for the grant of admiralty and maritime jurisdiction to the territorial courts. Consequently if that jurisdiction is exclusive, it is not made so by the reference to the District Court of Kentucky.

It has been contended that, by the Constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested "in one supreme court and in such inferior courts as Congress shall from time to time ordain and establish." Hence, it has been argued that Congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not Constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d Article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and of a State government.

We think, then, that the act of the territorial legislature erecting the court by whose decree the cargo of the "Point à Petre" was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently the sale made in pursuance of it changed the property, and the decree of the Circuit Court, awarding restitution of the property to the claimant, ought to be affirmed, with costs.

SECTION 8. FEDERAL JURISDICTION BY LOCALITY: HIGH SEAS.

"The Congress shall have power . . . to define and punish felonies committed on the high seas." — Constitution of the United States, Art. 1, § 8.

UNITED STATES *v.* COOMBS, ABOVE.

UNITED STATES *v.* WILTBERGER.

5 WHEAT. 76.

THIS was an indictment for manslaughter in the Circuit Court of the United States for the District of Pennsylvania. The jury found the defendant guilty of the offence with which he stood indicted, subject to the opinion of the Court whether this court has jurisdiction of the case, which was as follows: —

The manslaughter charged in the indictment was committed by the defendant on board of the American ship, "The Benjamin Rush," on a seaman belonging to the said ship, whereof the defendant was master, in the river Tigris, in the empire of China, off Wampoa, and about one hundred yards from the shore, in four and a half fathoms water and below the low-water mark, thirty-five miles above the mouth of the river. The water at the said place where the offence was committed is fresh, except in very dry seasons, and the tide ebbs and flows at and above the said place. At the mouth of the Tigris the government of China has forts on each side of the river, where custom-house officers are taken in by foreign vessels to prevent smuggling. The river at the mouth and at Wampoa is about half a mile in breadth.

And thereupon the opinions of the judges of the Circuit Court being opposed as to the jurisdiction of the court, the question was by them stated and directed to be certified to this court.

MARSHALL, C. J., delivered the opinion of the Court.

The indictment in this case is founded on the 12th section of the Act entitled "An Act for the punishment of certain crimes against the United States." That section is in these words: "And be it enacted that if any seaman or other person shall commit manslaughter on the high seas,[1] or confederate," etc., "such person or persons so offending and being thereof convicted, shall be imprisoned, not exceeding three years, and fined, not exceeding one thousand dollars."

The jurisdiction of the court depends on the place in which the fact

[1] [Amended to embrace localities such as that in question by Act of March 3, 1825, §§ 4 *et seq.* (U. S. Stats. at Large, 115, 116.)]

was committed. Manslaughter is not punishable in the courts of the United States, according to the words which have been cited, unless it be committed on the high seas. Is the place described in the special verdict a part of the high seas?

If the words be taken according to the common understanding of mankind, if they be taken in their popular and received sense, the "high seas," if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide and in the interior of a country. This extended construction of the words, it has been insisted, is still further opposed by a comparison of the 12th with the 8th section of the Act. In the 8th section Congress has shown its attention to the distinction between the "high seas" and "a river, haven, basin, or bay." The well known rule that this is a penal statute and is to be construed strictly is also urged upon us.

On the part of the United States the jurisdiction of the court is sustained, not so much on the extension of the words "high seas" as on that construction of the whole act, which would engraft the words of the 8th section, descriptive of the place in which murder may be committed, on the 12th section, which describes the place in which manslaughter may be committed. This transfer of the words of one section to the other is, it has been contended, in pursuance of the obvious intent of the legislature; and in support of the authority of the court so to do, certain maxims or rules for the construction of statutes have been quoted and relied on. It has been said that although penal laws are to be construed strictly, the intention of the legislature must govern in their construction; that if a case be within the intention, it must be considered as if within the letter of the statute; so, if it be within the reason of the statute.

. . . . . .

After giving the subject an attentive consideration, we are unanimously of opinion that the offence charged in this indictment is not cognizable in the courts of the United States; which opinion is to be certified to the Circuit Court for the District of Pennsylvania.

As to the three-mile belt of the high seas, see note to preceding section, Stat. 41 & 42 Vict. c. 73, United States *v.* Pirates, 5 Wheat. 184, Regina *v.* Keyn, 13 Cox C. C. 403.

SECTION 9. FEDERAL JURISDICTION BY LOCALITY: ADMIRALTY WATERS NOT PART OF THE HIGH SEAS (RIVERS, BAYS, ETC.). (*a*) FEDERAL RIGHTS OF JURISDICTION. (*b*) GREATER OR LESS EXERCISE OF THOSE RIGHTS. (*c*) RESERVED RIGHTS OF STATES.

(*a*) REGINA *v.* CARR,
10 Q. B. D. 76; 15 Cox C. C. 129.

REGINA *v.* ANDERSON,
1 L. R. C. C. 161; 11 Cox C. C. 198.

REGINA *v.* ARMSTRONG,
13 Cox C. C. 184.

REGINA *v.* LOPEZ,
7 Cox C. C. 431.

STATUTE CITED IN FOOTNOTE TO SECTION 8.

(*b*) UNITED STATES *v.* BEVANS, ABOVE.

(*c*) SMITH *v.* MARYLAND,
18 How. 71 [1855].

. . . . . .

MR. JUSTICE CURTIS delivered the opinion of the Court.

This is a writ of error to the Circuit Court for Anne Arundel County, in the State of Maryland, under the 25th section of the Judiciary Act of 1789. It appears by the record that the plaintiff in error, being a citizen of the State of Pennsylvania, was the owner of a sloop called "The Volant," which was regularly enrolled at the port of Philadelphia, and licensed to be employed in the coasting trade and fisheries; that in March, 1853, the schooner was seized by the sheriff of Anne Arundel County while engaged in dredging for oysters in the Chesapeake Bay, and was condemned to be forfeited to the State of Maryland by a justice of the peace of that State before whom the proceeding was had; that on appeal to the Circuit Court for the county, being the highest court in which a decision could be had, this decree of forfeiture was affirmed; and that the plaintiff in error insisted, in the Circuit Court, that such seizure and condemnation were repugnant to the Constitution of the United States.

This vessel being enrolled and licensed under the Constitution and laws of the United States to be employed in the coasting trade and fisheries, and while so employed having been seized and condemned under a law of a State, the owner has a right to the decision of this court upon the question whether the law of the State, by virtue of which condemnation passed, was repugnant to the Constitution or laws of the United States.

That part of the law in question containing the prohibition and inflicting the penalty, which appears to have been applied by the State court to this case, is as follows (1833, c. 254) : —

"*An Act to prevent the Destruction of Oysters in the Waters of this State.*"

"Whereas, the destruction of oysters in the waters of this State is seriously apprehended, from the destructive instrument used in taking them, therefore

"SECTION 1. *Be it enacted by the General Assembly of Maryland*, That it shall be unlawful to take or catch oysters in any of the waters of this State with a scoop or drag, or any other instrument than such tongs and rakes as are now in use and authorized by law ; and all persons whatever are hereby forbid the use of such instruments in taking or catching oysters in the waters of this State, on pain of forfeiting to the State the boat or vessel employed for the purpose, together with her papers, furniture, tackle, and apparel, and all things on board the same."

The question is, whether this law of the State afforded valid cause for seizing a licensed and enrolled vessel of the United States, and interrupting its voyage and pronouncing for its forfeiture. To have this effect we must find that the State of Maryland had power to enact this law.

The purpose of the law is to protect the growth of oysters in the waters of the State by prohibiting the use of particular instruments in dredging for them. No question was made in the court below whether the place in question be within the territory of the State. The law is in terms limited to the waters of the State. If the county court extended the operation of the law beyond those waters, that was a distinct and substantive ground of exception to be specifically taken and presented on the record, accompanied by all the necessary facts to enable this court to determine whether a voyage of a vessel, licensed and enrolled for the coasting trade, had been interrupted by force of a law of a State while on the high seas and out of the territorial jurisdiction of such State.

To present to this court such a question upon a writ of error to a State court, it is not enough that it might have been made in the court

below; it must appear by the record that it was made and decided against the plaintiff in error.

As we do not find from the record that any question of this kind was raised, we must consider that the acts in question were done and the seizure made within the waters of the State; and that the law, if valid, was not misapplied by the county court by extending its operation, contrary to its terms, to waters without the limits of the State. What we have to consider under this writ of error is, whether the law itself, as above recited, be repugnant to the Constitution or laws of the United States.

It was argued that it is repugnant to that clause of the Constitution which confers on Congress power to regulate commerce, because it authorizes the seizure, detention, and forfeiture of a vessel enrolled and licensed for the coasting trade under the laws of the United States, while engaged in that trade.

But such enrolment and license confer no immunity from the operation of valid laws of a State. If a vessel of the United States, engaged in commerce between two States, be interrupted therein by a law of a State, the question arises whether the State had power to make the law by force of which the voyage was interrupted. This question must be decided in each case upon its own facts. If it be found as in Gibbon *v.* Ogden, 9 Wheat. 1, that the State had not power to make the law under which a vessel of the United States was prevented from prosecuting its voyage, then the prevention is unlawful and the proceedings under the law invalid. But a State may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws.

In considering whether this law of Maryland belongs to one or the other of these classes of laws, there are certain established principles to be kept in view which we deem decisive.

Whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State or the sovereign power which governed its territory before the Declaration of Independence. Pollard's Lessee *v.* Hagan, 3 How. 212; Martin *v.* Waddell, 16 Pet. 367; Den *v.* The Jersey Co., 15 How. 426.

But this soil is held by the State not only subject to but in some sense in trust for the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish. Martin *v.* Waddell, *supra;* Den *v.* Jersey Co., *supra;* Corfield *v.* Coryell, 4 Wash. R. 376; Fleet *v.* Hagemen, 14 Wend. 42; Arnold *v.* Munday, 1 Halst. 1; Parker *v.* Cutler Milldam Corporation, 2 Appleton (Me.) R.

353; Peck *v.* Lockwood, 5 Day, 22; Weston, *et al. v.* Sampson *et al.*, 8 Cush. 347. The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words it may forbid all such acts as would render the public right less valuable or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held. Vattel, b. I., c. 20, § 246; Corfield *v.* Coryell, 4 Wash. R. 376. It has been exercised by many of the States. See Angell on Tide Waters, 145, 156, 170, 192, 193.

The law now in question is of this character. Its avowed and unquestionably its real object is to prevent the destruction of oysters within the waters of the State by the use of particular instruments in taking them. It does not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it may belong and by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the State of Maryland or may lawfully be enjoyed in common by all citizens of the United States; whether this public use may be restricted by the State to its own citizens or a part of them, or by force of the Constitution of the United States must remain common to all citizens of the United States; whether the national government by a treaty or act of Congress can grant to foreigners the right to participate therein; or what in general are the limits of the trust upon which the State holds this soil, or its power to define and control that trust, are matters wholly without the scope of this case and upon which we give no opinion.

So much of this law as is above cited may be correctly said to be not in conflict with, but in furtherance of, any and all public rights of taking oysters whatever they may be; and it is the judgment of the Court that it is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience by those on board of the commands of such a law; to inflict a forfeiture of a vessel on account of the misconduct of those on board, — treating the thing as liable to forfeiture because the instrument of the offence is within established principles of legislation which have been applied by most civilized governments. The Malek Adhel, 2 How. 233, 234, and cases there cited. Our opinion is that so much of this law as appears by the record to have been applied to this case by the court below is not repugnant to the clause in the Constitution of the United States which confers on Congress power to regulate commerce.

It was also suggested that it is repugnant to the 2d section of the

third Article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court in United States *v.* Bevans, 3 Wheat. 386, that this clause in the Constitution did not affect the jurisdiction nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the Constitution. The objection that the law in question contains no provision for an oath on which to found the warrant of arrest of the vessel cannot be here maintained. So far as it rests on the Constitution of the State the objection is not examinable here under the twenty-fifth section of the Judiciary Act. If rested on that clause in the Constitution of the United States which prohibits the issuing of a warrant but on probable cause supported by oath, the answer is that this restrains the issue of warrants only under the laws of the United States and has no application to State process. Barron *v.* Mayor, etc. of Baltimore, 7 Pet. 243; Lessee of Livingston *v.* Moore *et al.*, 7 Pet. 469; Fox *v.* Ohio, 5 How. 410.

The judgment of the Circuit Court of Maryland in and for Anne Arundel County is affirmed with costs.

COMMONWEALTH *v.* MANCHESTER (MASS.),

152 MASS. 000; 25 N. E. REP. 113.

SECTION 10. FEDERAL JURISDICTION BY SUBJECT-MATTER.

UNITED STATES *v.* ARJONA, ABOVE, p. 32.

UNITED STATES *v.* HALL.

98 U. S. 343 [1878].

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Southern District of Ohio.

The facts are stated in the opinion of the Court.

. . . . . .

MR. JUSTICE CLIFFORD delivered the opinion of the Court.

Pensions granted to children under sixteen years of age may, in certain cases, be paid to their guardians, and the act of Congress provides

that every guardian having the charge and custody of the pension of his ward, who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine not exceeding $2,000, or imprisonment at hard labor for a term not exceeding five years, or both. Rev. Stat. § 4783.

Sufficient appears to show that the defendant in the indictment is the guardian of William Williamson, who was at the time mentioned, and long before had been, entitled to a pension from the government of the United States, and that the defendant, as such guardian, had collected pension-money belonging to his said ward as such pensioner, to the amount of $500, for which he had never accounted, and which he had never expended for nor paid to his said ward.

Payment of the money being refused and withheld, an indictment against the defendant was returned by the grand jury of the Circuit Court, in which it is charged, among other things, that he, the respondent, being then and there the duly appointed guardian of William Williamson, who was entitled to a pension from the government of the United States, and having then and there, as such guardian, the charge and custody of the pension-money belonging to said ward, did unlawfully and feloniously embezzle, in violation of his trust, a large sum of money, to wit, $500, pension-money belonging to his said ward, which he, the defendant, as such guardian, had theretofore collected from the government of the United States.

Due appearance was entered by the defendant, and he demurred to the indictment. Hearing was had; and the following questions arose, upon which the judges of the Circuit Court were opposed in opinion, and the same were duly certified to this court: —

1. Whether the Circuit Court has any jurisdiction over the alleged offence, or any power to punish the defendant for any appropriation of the money after its legal payment to him as such guardian, it appearing that the defendant is the legal guardian of his ward under the laws of the State; and that the money alleged to have been embezzled and fraudulently converted to his own use had been paid over to him by the government, and belonged to his said ward.

2. If the defendant did embezzle the money and convert the same to his own use after it was paid over to him by the government, is he liable to indictment for the offence under the act of Congress, or only under the State Law?

3. Is the act of Congress under which the indictment is found a constitutional and valid law?

. . . . . .

For the defendant, it is insisted that when the payment is made to the guardian, the money paid ceases to be within the constitutional con-

trol of the United States; and that the act of Congress, which enacts that the guardian who embezzles the money or fraudulently converts the same to his own use is guilty of a misdemeanor, is unconstitutional and void. But the Court is unhesitatingly of a different opinion, for several reasons: 1. Because the United States, as the donors of the pensions, may, through the legislative department of the government, annex such conditions to the donation as they see fit, to insure its transmission unimpaired to the beneficiary. 2. Because the guardian no more than the agent or attorney of the pensioner is obliged by the laws of Congress to receive the fund; but if he does, he must accept it subject to the annexed conditions. 3. Because the word "guardian," as used in the acts of Congress, is merely the designation of the person to whom the money granted may be paid for the use and benefit of the pensioners. 4. Because the fund proceeds from the United States, and inasmuch as the donation is a voluntary gift, the Congress may pass laws for its protection, certainly until it passes into the hands of the beneficiary, which is all that is necessary to decide in this case. 5. Because the elements of the offence defined by the act of Congress in question consist of the wrongful acts of the individual named in the indictment, wholly irrespective of the duties devolved upon him by the State law. 6. Because the theory of the defendant that the act of Congress augments, lessens, or makes any change in respect to the duties of a guardian under the State law is entirely erroneous, as the act of Congress merely provides that the pension may be paid to the person designated as guardian, for the use and benefit of the pensioner, and that the person who receives the pension, if he embezzles it or fraudulently converts it to his own use, shall be guilty of a misdemeanor, and be punished as therein provided.

Viewed in the light of these suggestions, it is clear that Congress possessed the power: 1. To define the offence set forth in the indictment, and that the Circuit Court is vested with the jurisdiction to try the offender and sentence him to the punishment which the act of Congress imposed. 2. That the defendant, under the circumstances disclosed in the record, was liable to indictment in the Circuit Court of the United States. 3. That the act of Congress defining the offence set forth in the indictment is a valid and constitutional law enacted in pursuance of the Constitution.

Answers will be certified in conformity with this opinion; that is, the answer to the first question must be in the affirmative, and the answers to the second and third questions in the negative; and it is

So ordered.

UNITED STATES *v.* FOX,

95 U. S. 670 [1877].

On a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York.

In November, 1874, the defendant filed a petition in bankruptcy in the District Court for the Southern District of New York. In March, 1876, he was indicted in the Circuit Court for that district for alleged offences against the United States, and among others for the offence described in the ninth subdivision of § 5132 of the Revised Statutes, which provides that "every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor," who, within three months before their commencement, "under the false color and pretence of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud," shall be punished by imprisonment for a period not exceeding three years.

The indictment, among other things, charged the defendant with having, within three months previous to the commencement of his proceedings in bankruptcy, purchased and obtained on credit goods from several merchants in the city of New York, upon the pretence and representation of carrying on business and dealing in the ordinary course of trade as a manufacturer of clothing; whereas he was not carrying on business in the ordinary course of trade as such manufacturer, but was selling goods to some parties by the piece for cost, and to other parties at auction for less than cost, and that these pretences and representations were made to defraud the parties from whom the goods were purchased.

The defendant was convicted; and upon a motion in arrest of judgment, the judges holding the Circuit Court were opposed in opinion, and have certified to this court the question upon which they differed. That question is thus stated in the certificate: —

"If a person shall engage in a transaction which, at the time of its occurrence, is not a violation of any law of the United States, to wit, the obtaining goods upon credit by false pretences, and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy?"

MR. JUSTICE FIELD delivered the opinion of the Court.

The question presented by the certificate of division does not appear to us difficult of solution. Upon principle, an act which is not an offence at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. By the clause in question, the obtaining of goods on credit upon false pretences is made an offence against the United States upon the happening of a subsequent event, not perhaps in the contemplation of the party, and which may be brought about, against his will, by the agency of another. The criminal intent essential to the commission of a public offence must exist when the act complained of is done: it cannot be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offence, one act being auxiliary to another in carrying out the criminal design. But the present is not a case of that kind. Here an act which may have no relation to proceedings in bankruptcy becomes criminal, according as such proceedings may or may not be subsequently taken, either by the party or by another.

There is no doubt of the competency of Congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted. And as it is authorized "to establish uniform laws on the subject of bankruptcies throughout the United States," it may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system. The object of such a system is to secure a ratable distribution of the bankrupt's estate among his creditors, when he is unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his debts, upon a surrender of his property. The distribution of the property is the principal object to be attained. The discharge of the debtor is merely incidental and is granted only where his conduct has been free from fraud in the creation of his indebtedness or the disposition of his property. To legislate for the prevention of frauds in either of these particulars, when committed in contemplation of bankruptcy, would seem to be within the competency of Congress. Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offence against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having

any such relation is one in respect to which the State can alone legislate.

The act described in the ninth subdivision of § 5132 of the Revised Statutes is one which concerns only the State in which it is committed; it does not concern the United States. It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy; but it does not say so, and we cannot supply qualifications which the legislature has failed to express.

Our answer to the question certified must be in the negative; and it will be so returned to the Circuit Court.

UNITED STATES *v.* DEWITT,

9 WALL. 41 [1869].

ON certificate of division in opinion between the judges of the Circuit Court for the Eastern District of Michigan, the case being this: —

Section 29 of the Act of March 2, 1867,[1] declares —

"That no person shall mix for sale naphtha and illuminating oils, or shall knowingly sell or keep for sale or offer for sale such mixture, or shall sell or offer for sale oil made from petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110 degrees Fahrenheit; and any person so doing, shall be held to be guilty of a misdemeanor, and on conviction thereof by indictment or presentment in any court of the United States having competent jurisdiction, shall be punished by fine, etc., and imprisonment," etc.

Under this section one Dewitt was indicted, the offence charged being the offering for sale at Detroit in Michigan oil made of petroleum of the description specified. There was no allegation that the sale was in violation or evasion of any tax imposed on the property sold. It was alleged only that the sale was made contrary to law.

To this indictment there was a demurrer, and thereupon arose two questions on which the judges were opposed in opinion.

1. Whether the facts charged in the indictment constituted any offence under any valid and constitutional law of the United States?

2. Whether the aforesaid section 29 of the Act of March 2d, 1867, was a valid and constitutional law of the United States?

Mr. Field, Assistant Attorney-General, for the United States.

Instances of the exercise of police power over certain instruments or

[1] 14 Stat. at Large, 484.

agencies of commerce, for the protection of life and property, are found in various acts of Congress.[1]

In the License Tax Cases[2] it is held that the provisions of the internal revenue laws requiring the payment of a license tax and prohibiting under penalties the exercise of certain kinds of business within a State without such tax having been paid, are only modes of enforcing the payment of excise taxes; that the payment of such special tax or license tax conveys to the licensee no authority to carry on the business licensed within a State which prohibits its being carried on, but that such provisions of law as incidental to the taxing power are not unconstitutional.

So far as appears there was no law of the State of Michigan regulating the sale of oil made from petroleum at the time when the alleged offence was committed. There is no decision of this court that Congress cannot enact a law regulating trade in a State, in the absence of any regulation by the State, when the articles of the trade thus regulated may enter into commerce with other States or with foreign countries. It has been decided by this court that Congress may prohibit the exercise of a trade within a State under a penalty, in aid of or for the purpose of collecting excise taxes levied upon the exercise of such trade.

One reason for the enactment *may* have been the protection of transportation companies between the States and between the United States and foreign countries from danger to property and life in transporting oil, mixed or sold in violation of this statute; and the protection of revenue officers in the examination, gauging, marking, and storing of such oil; and the proper distinction between and classification of different kinds of mineral oils made necessary for the convenient assessment and collection of excise taxes. If this was the reason then the regulations are fairly incidental to the exercise of the power to regulate commerce or of the taxing power, and as such constitutional.

The CHIEF JUSTICE delivered the opinion of the Court.

The questions certified resolve themselves into this: Has Congress power under the Constitution to prohibit trade within the limits of a State?

That Congress has power to regulate commerce with foreign nations and among the several States and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms, and as a virtual denial of any power to interfere with the inter-

[1] Acts of March 3, 1843, 5 Stat. at Large, 626; August 30, 1852, 10 id. 61; May 5, 1864, 13 id. 63; July 25, 1866, 14 id. 228.

[2] 5 Wallace, 462.

nal trade and business of the separate States, except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed, while in the case before us no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and consequently the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an act imposing internal duties. Standing by itself it is plainly a regulation of police, and that it was so considered, if not by the Congress which enacted it, certainly by the succeeding Congress, may be inferred from the circumstance that while all special taxes on illuminating oils were repealed by the Act of July 20, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

As a police regulation relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes territorially all State legislation, as for example, in the District of Columbia. Within State limits it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions,[1] that we think it unnecessary to enter again upon the discussion.

The first question certified must, therefore, be answered in the negative.

[1] License Cases, 5 Howard, 504; Passenger Cases, 7 id. 283; License Tax Cases, 5 Wallace, 470; and the cases cited.

The second question must also be answered in the negative, except so far as the section named operates within the United States but without the limits of any State.

SECTION 11. JURISDICTION BY SUBJECT-MATTER: FEDERAL COGNIZANCE, IN CERTAIN CASES, OF ALLEGED OFFENCES AGAINST STATE LAWS.

TENNESSEE *v.* DAVIS,

100 U. S. 257.

In re NEAGLE,

135 U. S. 1.

SECTION 12. FEDERAL JURISDICTION BY SUBJECT-MATTER: CONCURRENT WITH STATE JURISDICTION OVER SPECIFIC ACTS.

FOX *v.* STATE OF OHIO,

5 HOWARD, 410 [1846].

DANIEL, J., delivered the opinion of the Court.

This case comes before us on a writ of error to the Supreme Court of the State of Ohio, by whose judgment was affirmed the judgment of the Court of Common Pleas for the county of Morgan in that State, convicting the plaintiff of passing, with fraudulent intent, a base and counterfeit coin in the similitude of a good and legal silver dollar, and sentencing her, for that offence, to imprisonment and labor in the State penitentiary for three years.

The prosecution against the plaintiff occurred in virtue of a statute of Ohio of March 7, 1835, and the particular clause on which the indictment was founded is in the following language, namely: "That if any person shall counterfeit any of the coins of gold, silver, or copper, currently passing in this State, or shall alter or put off counterfeit coin or coins, knowing them to be such," etc., "every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor not more than fifteen, nor less than three years." As has been already stated, the plaintiff was convicted of the offence described in the statute, her sentence was affirmed by the Supreme Court of the State, and with the view of testing the validity of the sentence, a writ of error to the latter court has been issued.

With the exceptions taken to the formality or technical accuracy of

the pleadings pending the prosecution, this court can have nothing to do. The only question with which it can regularly deal in this case is the following, namely: Whether that portion of the statute of Ohio, under which the prosecution against the plaintiff has taken place, and consequently whether the conviction and sentence founded on the statute are consistent with or in contravention of the Constitution of the United States, or of any law of the United States enacted in pursuance of the Constitution? For the plaintiff, it is insisted that the statute of Ohio is repugnant to the fifth and sixth clauses of the 8th section of the first article of the Constitution, which invest Congress with the power to coin money, regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States; contending that these clauses embrace not only what their language directly imports, and all other offences which may be denominated offences against the coin itself, such as counterfeiting, scaling, or clipping it, or debasing it in any mode, but that they embrace other offences, such as frauds, cheats, or impositions between man and man by intentionally circulating or putting upon any person a base or simulated coin. On behalf of the State of Ohio, it is insisted that this is not the correct construction to be placed upon the clauses of the Constitution in question, either by a natural and philological interpretation of their language or by any real necessity for the attainment of their objects; and that if any act of Congress should be construed as asserting this meaning in the Constitution, and as claiming from it the power contended for, it would not be a law passed in pursuance of the Constitution, nor one deriving its authority regularly from that instrument.[1]

[1] [Act of March 3, 1825. "An Act more effectually to provide for the punishment of certain crimes against the United States and for other purposes." (4 U. S. Stats. at Large, pp. 115, 121.)

"SECT. 20. And be it further enacted, That, if any person, or persons, shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting any coin, in the resemblance or similitude of the gold or silver coin, which has been, or hereafter may be, coined at the mint of the United States; or in the resemblance or similitude of any foreign gold or silver coin which by law now is, or hereafter may be made current in the United States; or shall pass, utter, publish, or sell or attempt to pass, utter, publish, or sell, or bring into the United States, from any foreign place, with intent to pass, utter, publish, or sell, as true, any such false, forged, or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any body politic, or corporate, or any other person or persons, whatsoever; every person, so offending, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and by imprisonment, and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence."]

We think it manifest that the language of the Constitution, by its proper signification, is limited to the facts, or to the faculty in Congress of coining and of stamping the standard of value upon what the government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces, or alters nothing; it leaves the legal coin as it was, affects its intrinsic value in no wise whatsoever. The criminality of this act consists in the obtaining, for a false representative of the true coin, that for which the true coin alone is the equivalent. There exists an obvious difference, not only in the description of these offences, but essentially also in their characters. The former is an offence directly against the government, by which individuals may be affected; the other is a private wrong, by which the government may be remotely, if it will in any degree be, reached. A material distinction has been recognized between the offences of counterfeiting the coin and of passing base coin by a government which may be deemed sufficiently jealous of its authority; sufficiently rigorous, too, in its penal code. Thus, in England, the counterfeiting of the coin is made high treason, whether it be uttered or not; but those who barely utter false money are neither guilty of treason nor of misprision of treason. 1 Hawkin's Pleas of the Crown, 20. Again, 1 East's Crown Law, 178, if A. counterfeit the gold or silver coin, and by agreement, before such counterfeiting, B. is to receive and vent the money, he is an aider and abettor to the act itself of counterfeiting, and consequently a principal traitor within the law. But if he had merely vented the money for his own private benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanor, etc. These citations from approved English treatises on criminal law are adduced to show, in addition to the obvious meaning of the words of the Constitution, what has been the adjudged and established import of the phrase "counterfeiting the coin," and to what description of acts that phrase is restricted.

It would follow from these views, that if within the power conferred by the clauses of the Constitution above quoted can be drawn the power to punish a private cheat effected by means of a base dollar, that power certainly cannot be deduced from either the common sense or the adjudicated meaning of the language used in the Constitution, or from any apparent or probable conflict which might arise between the Federal and State authorities, operating each upon these distinct characters of offence. If any such conflict can be apprehended, it must be from some remote and obscure and scarcely comprehensible possibility, which can never constitute an objection to a just and necessary State power. The punishment of a cheat or a misdemeanor practised within

the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable. It has been objected on behalf of the plaintiff in error, that if the States could inflict penalties for the offence of passing base coin, and the Federal government should denounce a penalty against the same act, an individual under these separate jurisdictions might be liable to be twice punished for the one and the same crime, and that this would be in violation of the fifth article of the amendments to the Constitution, declaring that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. Conceding for the present that Congress should undertake, and could rightfully undertake, to punish a cheat perpetrated between citizens of a State because an instrument in effecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed is not perceived; for the position is itself without real foundation. The prohibition alluded to as contained in the amendments to the Constitution, as well as others with which it is associated in those Articles, were not designed as limits upon the State governments in reference to their own citizens. They are exclusively restrictions upon Federal power, intended to prevent interference with the rights of the States and of their citizens. Such has been the interpretation given to those amendments by this court, in the case of Barron *v.* The Mayor and City Council of Baltimore, 7 Pet. 242; and such indeed is the only rational and intelligible interpretation which those amendments can bear, since it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the Federal Constitution restrictions upon their own authority, — restrictions which some of the States regarded as the *sine qua non* of its adoption by them. It is almost certain that in the benignant spirit in which the institutions both of the State and Federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other, for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration. The particular offence described in the Statute of Ohio, and charged in the indictment against the plaintiff in error, is deemed by this Court to be clearly within the rightful power and jurisdiction of the State. So far

then neither the statute in question nor the conviction and sentence founded upon it can be held as violating either the Constitution or any law of the United States made in pursuance thereof. The judgment of the Supreme Court of the State of Ohio, affirming that of the Court of Common Pleas, is therefore in all things, affirmed.[1]

COMMONWEALTH *v.* FELTON,

101 Mass. 204 [1869].

Indictment charging that James D. Martin, as cashier of the National Hide and Leather Bank, a banking association incorporated under the laws of the United States, embezzled the funds of the bank, and that Alexander C. Felton was an accessory thereto before the fact.

The defendants filed separate pleas to the jurisdiction, alleging that the United States courts had exclusive cognizance of the offences charged in the indictment, as against both defendants, and that they both had, before the pendency of this indictment, been indicted in the United States Circuit Court. In the Superior Court, Ames, C. J., allowed Martin's plea, but overruled the plea of Felton, who thereupon pleaded *nolo contendere* and alleged exceptions.

C. Allen, Attorney-General (*J. C. Davis*, Assistant Attorney-General with him), for the Commonwealth An indictment may be maintained in the courts of this Commonwealth for being accessory before the fact to an embezzlement, by a bank officer, of the funds of a national bank. It may be conceded that the United States courts have exclusive jurisdiction of the offence committed by the bank officer. Still, that offence is fully within the terms of the Gen. Sts. c. 161, § 39, and in the absence of any statute of the United States covering the offence, the principal would be punishable under the laws of the Commonwealth. Commonwealth *v.* Tenney, 97 Mass. 56. But for the passage of the United States St. of 1864, c. 106,[2] the courts of

[1] [See Dashing *v.* State, 78 Ind. 357 (1886).]

[2] [United States Stats. 1864, c. 106, § 55. *And be it further enacted*, That every president, director, cashier, teller, clerk, or agent of any association, who shall embezzle, abstract, or wilfully misapply any of the moneys, funds, or credits of the association, or shall, without authority from the directors, issue or put in circulation any of the notes of the association, or shall, without such authority, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or shall make any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other

the Commonwealth would clearly have had jurisdiction of the offence charged against Felton, as well as jurisdiction of the offence committed by the principal. The latter jurisdiction is by that statute transferred to the United States courts, but not the former. Is the former therefore destroyed and the criminal rendered dispunishable? The United States may well punish the principal and the Commonwealth the accessory. There is nothing to prevent national and State courts from exercising concurrent jurisdiction over both principal and accessory, if the United States statute should so provide. The jurisdiction of the Commonwealth to punish criminals does not rest on any concession by Congress. Under our statutes, and independently of the United States statute, the cashier would be punishable as principal and Felton as accessory. Jurisdiction over the offence of the cashier has been taken away. Why should not the jurisdiction over the accessory remain?

Ames, J. The indictment against this defendant charges him with a crime of so grave a character that it ought to be made a matter of judicial investigation somewhere, upon the facts and merits. But as he is indicted for the same transaction in two different jurisdictions, namely, in the Circuit Court of the United States and in the Superior Court of this Commonwealth, it becomes necessary to decide to which, if to either, of these two jurisdictions he is properly amenable; or, to state the question with more strict accuracy, whether he is liable to be proceeded against under the laws of this Commonwealth.

The statutes of this Commonwealth (Gen. Sts. c. 161, § 39) have made full and ample provision for the case of the embezzlement or fraudulent appropriation by any cashier or other officer of any incorporated bank of any of the funds of such bank. This description of crime by our laws is a felony, and is punishable by imprisonment in the State prison. It has recently been decided that the language of this statute is broad enough to include banking corporations organized under the laws of the United States and located in Massachusetts, as well as like corporations created by the laws of this State. Commonwealth *v.* Tenney, 97 Mass. 50. So far as the case depends on our own legislation, and if nothing has been done to impair the jurisdiction of our own tribunals in such a case, there can be no doubt that Martin, the cashier of the Hide and Leather National Bank, could well be indicted and tried in the Superior Court for embezzlement of the funds of the bank, and this defendant could also in like manner be indicted

company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not less than five nor more than ten years.]

jointly with him, or separately, as accessory before the fact to the same embezzlement.

But the act of Congress (U. S. St. 1864, c. 106) from which the national banks derive their existence and organization contains a section (§ 39) [55?] which also makes full and ample provision for the punishment of the crime of embezzlement and fraudulent appropriation of any funds of a national bank by any cashier, etc., of such bank. It exactly covers the crime imputed to Martin. It declares that description of crime to be a misdemeanor, and makes it punishable by imprisonment in the State prison. It makes no provision or reservation for its prosecution and punishment by any State authority, but makes it cognizable under the authority of the United States. By the terms of the Judiciary Act (U. S. St. 1789, c. 20, § 11), the courts of the United States are vested with the exclusive cognizance of all crimes that are made punishable by act of Congress, except where the act of Congress makes other provision; and it would therefore seem that the crime of embezzlement by a cashier of a national bank located within our territory is taken out of the jurisdiction of our courts. This is at least strongly implied in Commonwealth v. Tenney, and in fact is conceded by the learned Attorney-General in the argument of this case. See also Commonwealth v. Fuller, 8 Met. 313. If Martin, then, as a bank officer, is not amenable in our courts for embezzlement from the bank, can Felton be indicted in the same courts, as an accessory before the fact, for the same embezzlement? The technical and somewhat narrow rule of the common law on the subject of principal and accessory has been very extensively and reasonably enlarged by modern legislation. "Whoever counsels, hires, or otherwise procures a felony to be committed, may be indicted and convicted as an accessory before the fact, either with the principal felon, or after his conviction; or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice." Gen. Sts. c. 168, § 4. But the difficulty in the way of holding the defendant upon the present indictment is, that the act of Congress has taken the crime of the principal out of our jurisdiction. Our courts cannot deal with him upon that charge. By the terms of the same act, which in this matter is the controlling authority, the crime of the principal has ceased to be a felony and has become a misdemeanor only, — a description of crime in which there are no accessories. A defaulting cashier of a national bank, however flagrant his embezzlement may be, so far from being a principal felon, is not in legal strictness a felon at all; and it would seem to be impossible, therefore, to say that Felton, even if he in fact counselled, hired, or otherwise procured the crime to be committed, can be said to be

thereby rendered accessory to a felony within the terms of the above cited statute. Gen. Sts. c. 168, § 4. The effect of our decision may very probably be to leave what is charged as a great crime to go wholly unpunished and untried; but that is a result which we have no power to prevent. *Exceptions sustained.*

COMMONWEALTH *v.* BARRY,

116 Mass. 1 [1874].

Indictment on the Gen. Sts. c. 161, § 43, charging the defendant on October 21, 1871, with feloniously buying and receiving and aiding in the concealment of certain legal-tender notes and bank bills of the goods, chattels, and moneys of the National Mahawie Bank, knowing the same to have been feloniously stolen, the said legal-tender notes and bank bills having been before then feloniously stolen, taken, and carried away by one William S. Hine.

. . . . . .

J. M. Barker (*E. M. Wood* with him), for the defendant. 1. The offence of the defendant was only cognizable by the courts of the United States. It appeared in evidence that Hine was the teller of the National Mahawie Bank, which was organized under the U. S. St. of 1864, c. 106, and that while such teller, he abstracted and took from the vault of the bank a large sum of money belonging to the bank, and converted it to his own use. This was an offence under § 55 of that Act, and was punishable as a misdemeanor. There was evidence tending to show that the defendant aided and abetted Hine in taking said money and converting it to his own use, advising with him in regard to taking the money, and assisting him in carrying the same to Van Deusenville, and receiving and concealing a portion of the same. By so doing he committed an offence under the U. S. St. of 1869, c. 145. The offence was only cognizable by the courts of the United States. The U. S. St. of 1789, c. 20, § 11, provides that the Circuit Courts of the United States "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct." No law of the United States gives to the State courts cognizance of offences under the U. S. St. of 1864, c. 106, or the U. S. St. of 1869, c. 145. It therefore follows that the State courts have no jurisdiction of the offence committed by the defendant. Commonwealth *v.* Felton, 101 Mass. 204; Prigg's Case, 16 Pet. 539, 617; Houston *v.* Moore, 5 Wheat. 1, 27; 1 Kent Com. (12th

ed.) 399; Commonwealth v. Fuller, 8 Met. 313, 319; Commonwealth v. Tenney, 97 Mass. 50.

2. The offence of Hine, as stated in his own testimony, was embezzlement and not larceny. He was the teller of the bank; that is, the officer who receives and pays out its money; and as he testifies, that upon that evening at half-past eight o'clock, he himself placed the moneys of the bank in the safe, inside the vault, and fastened the doors, as teller of the bank he could lawfully take its moneys from the safe and pay them to third persons, and his office of teller continued in the night-time as well as during the day. This case is distinguishable from Commonwealth v. Davis, 104 Mass. 548, by the fact that in the latter case the defendant had no right to remove the goods, or to sell them, or have even the bare custody of them, being simply a clerk and packer in the employ of the owner of the goods.

3. It is entirely immaterial whether the crime of Hine was embezzlement or larceny. Whichever it was, all the acts which he did from the time when he took the money out of the vault, until he and the defendant parted at Van Deusenville, constituted an offence under the U. S. St. of 1864, c. 106, § 55; and in doing all these acts he was, according to the testimony, aided and abetted by the defendant, who, in doing all that he did, committed an offence under the U. S. St. of 1869, c. 145, which offence was cognizable by the courts of the United States, and only there.

WELLS, J. The only question argued before us by the defendant is that of jurisdiction. It is contended that when an offence is punishable both by the laws of a State and by those of the United States, the jurisdiction of the courts of the latter excludes that of the State courts, unless otherwise provided by the laws of the United States.

If we assume that position to be correct, it does not meet this case. The offence charged in the indictment, upon which the defendant was found guilty, is that of receiving and aiding in the concealment of stolen property, under the Gen. Sts. c. 161, § 43. The count recites the previous larceny of the property, consisting of money, from the National Mahawie Bank, by William S. Hine. Both this and the principal offence of Hine, as set forth, are independent of any trust and of any relation of either to the bank as officer, clerk, or agent. But such relation and breach of trust are essential elements in the offence punishable under the laws of the United States. The U. S. St. of 1864, c. 106, § 55 provides, "That every president, director, cashier, teller, clerk, or agent of any association, who shall embezzle, abstract or wilfully misapply any of the moneys, funds, or credits of the association" shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not less than five nor more than ten years.

The two offences are essentially different. The statute of the United States does not purport to punish larceny as such. The obvious inference is that Congress did not intend to interfere with the jurisdiction of State laws and State courts over offences of that class against the property of national banks.

The defendant contends that as it appeared in evidence that Hine was in fact teller of the bank and was enabled through that position to secure the means by which to "abstract" the funds from its vault, his offence comes within the terms of the statute of the United States, and is punishable exclusively under it; and therefore that the accessorial offence of Barry cannot be punished at all. Commonwealth *v.* Felton, 101 Mass. 204.

In our opinion, neither branch of this proposition can be maintained. In the first place, if the fact that Hine was teller of the bank subjects him to the punishment imposed for his breach of trust in that capacity, under the statute of the United States, it does not relieve him from his liability to punishment for the larceny at common law or under statutes of the State. There is no identity in the character of the two offences, although the same evidence may be relied upon to sustain the proof of each. An acquittal or conviction of either would be no bar to a prosecution for the other. Commonwealth *v.* Tenney, 97 Mass. 50; Commonwealth *v.* Hogan, 97 Mass. 122; Commonwealth *v.* Harrison, 11 Gray, 308; Commonwealth *v.* Shea, 14 Gray, 386; Commonwealth *v.* Carpenter, 100 Mass. 204; Morey *v.* Commonwealth, 108 Mass. 433. Exclusive jurisdiction of the one does not exclude jurisdiction of the other.

Upon the facts stated it is clear that the offence of Hine was larceny and not embezzlement. Although as teller he was entrusted with funds of the bank while engaged in transacting its business, at night they were withdrawn from his possession and placed in such custody that he could not lawfully resume possession until the return of business hours and the concurrence of the cashier authorized him to do so. That custody was possession by the bank; and his wrongful violation of it made the taking of the funds larceny. Commonwealth *v.* Berry, 99 Mass. 428; Commonwealth *v.* Davis, 104 Mass. 548.

In the second place the offence of receiving stolen property is a substantive crime in itself, and not merely accessorial to the principal offence of larceny. In this respect the case is clearly distinguishable from that of Commonwealth *v.* Felton, *supra.*

Exceptions overruled.

CHAPTER III.

The Mental Element in Crime.

Insanity; Drunkenness; Immaturity; Coercion; Pressure of Circumstances.

REGINA v. BARTON,

3 Cox C. C. 275 [1848].

The prisoner was indicted for the wilful murder of Harriet Barton, on the 22d of June, by cutting her throat with a razor.

Wells, for the prosecution, proved that the prisoner and the deceased were husband and wife, and that, up to the day named in the indictment, he had always treated her and their children with kindness. On the afternoon of the 21st of June the prisoner and his wife were seen talking with their next-door neighbor at their door late at night, and at four o'clock in the following morning it was discovered that he had cut the throats of his wife and child, and that he had attempted to commit suicide. When questioned by the surgeon, he exhibited no sorrow or remorse for his conduct, but stated that "trouble and dread of poverty and destitution had made him do it, fearing that his wife and child would starve when he was dead." He also said that he had contemplated suicide for a week past; that he had not had any quarrel with his wife, and that, having got out of bed to destroy himself, the thought had first come into his head to kill his wife and child; that he had first attacked her while asleep in bed, and that she got away from him and rushed to the window, calling for help; that he then killed the child, and seizing his wife, pulled her backwards towards him, in which position he had cut her throat. This done he next tried to cut his own throat, but his powers failed him and he did not succeed, though he wounded himself severely, his wife having fallen down dead by his side. This narrative, coupled with a knowledge of the prisoner's private circumstances, induced the surgeon to form the opinion that the prisoner at the time he committed the act had not, in consequence of an uncontrollable impulse to which all human beings were subject, any control over his conduct. The desire to inflict pain and injury on those previously dear to the prisoner was in itself a strong symptom of insanity, and the impossibility of resisting a sudden impulse

to slay a fellow-being was another indication that the mind was insane. There was not necessarily a connection between homicidal and suicidal monomania, though it would be more likely that a monomaniac who had contemplated suicide should kill another person than for one who had not entertained any such feelings of hostility to his own existence. Monomania was an affection which, for the instant, completely deprived the patient of all self-control in respect of some one particular subject which is the object of the disease. It was true that the prisoner had no delusion and his reasoning faculties did not seem to be affected; but he had a decided monomania, evincing itself in the notion that he was coming to destitution. For that there was some foundation in fact, but it was his (the surgeon's) decided opinion that the prisoner was in an unsound state of mind at the moment he cut his wife's throat, though he would not be so in all cases of murder.

It was also proved that on the 21st of June the prisoner had caused his razor to be sharpened, saying that he wanted it to give to some friend.

Couch, for the prisoner, submitted that the jury were bound, after the testimony of the surgeon, to acquit the prisoner on the ground of insanity, and he proceeded to show by other witnesses that the prisoner had suffered a severe pecuniary loss not long before the occurrence of the dreadful event now the subject of inquiry, and that it had produced a decided effect on his mind, giving rise to the most gloomy anticipations on account of his wife and family.

Parke, B., told the jury that there was but one question for their consideration now; namely, whether at the time the prisoner inflicted the wounds which caused the death of his wife, he was in a state of mind to be made responsible to the law for her murder. That would depend upon the question whether he at the time knew the nature and character of the deed he was committing, and if so, whether he knew he was doing wrong in so acting. This mode of dealing with the defence of insanity had not, he was aware, the concurrence of medical men; but he must nevertheless express his decided concurrence with Mr. Baron Rolfe's views of such cases, that learned judge having expressed his opinion to be that the excuse of an irresistible impulse, co-existing with the full possession of reasoning powers, might be urged in justification of every crime known to the law, — for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. Something more than this was necessary to justify an acquittal on the ground of insanity, and it would be therefore for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse under which the prisoner had committed this deed was one which altogether deprived

him of the knowledge that he was doing wrong. Could he distinguish between right and wrong? Reliance was placed on the desire to commit suicide, but that did not always evidence insanity. And here the prisoner was led to attempt his own life by the pressure of a real substantial fact clearly apparent to his perceptive organs, and not by any unsubstantial delusion. The fact, however, must be taken into the account, for it might have had a serious effect on the mind of the prisoner; as also the absence of any attempt to escape from justice, and the want of all sense of sorrow and regret immediately after the death of his wife, contrasted with his more natural state of mind afterwards when he felt and expressed regret and sorrow for his act. These circumstances ought all to be taken into consideration; but it was difficult to see how they could establish the plea of insanity in a case where there was a total absence of all delusion.

Guilty. Sentence of death passed.[1]

REGINA *v.* BURTON,

3 F. & F. 772 [1863].

THE prisoner, a youth of eighteen, was indicted for the murder of a boy.

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WIGHTMAN, J., in summing up the case said: As there was no doubt about the act the only question was whether the prisoner at the time he committed it was in such a state of mind as not to be responsible for it. The *prisoner's* account of it was that he had done it from a morbid feeling; that he was tired of life and wished to be rid of it. No doubt prisoners had been acquitted of murder on the ground of insanity; but the question was what were the cases in which men were to be absolved from responsibility on that ground. Hatfield's case differed from the present, for there wounds had been received on the head which were proved to have injured the brain. In the more recent case of Macnaghten, the judges had laid down the rule to be, that there must, to raise the defence, be a defect of reason from disease of the mind, so as that the person did not know the nature and quality of the act he committed, or did not know whether it was right or wrong. Now to apply this rule to the present case would be the duty of the jury. It was not mere eccentricity of conduct which made a man legally irresponsible for his acts. The medical man called for the defence defined homicidal mania to be a propensity to kill, and de-

[1] [The prisoner was reprieved.]

scribed moral insanity as a state of mind under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrollable impulse. This would appear to be a most dangerous doctrine and fatal to the interests of society and security of life. The question is whether such a theory is in accordance with law. The rule as laid down by the judges is quite inconsistent with such a view; for it was that a man was responsible for his actions if he knew the difference between right and wrong. It was urged that the prisoner did the act to be hanged, and so was under an insane delusion; but what delusion was he under? So far from it, it showed that he was quite conscious of the nature of the act and of its consequences. He was supposed to desire to be hanged, and in order to attain the object committed murder. That might show a morbid state of mind but not delusion. Homicidal mania again, as described by the witnesses for the defence, showed no delusion. It merely showed a morbid desire for blood. Delusion meant the belief in what did not exist. The question for the jury was whether the prisoner at the time he committed the act was laboring under such a species of insanity as to be unaware of the nature, the character, or the consequences of the act he committed, — in other words whether he was incapable of knowing that what he did was wrong. If so, they should acquit him; if otherwise, they should find a verdict of guilty. *Verdict guilty.*

REGINA *v.* HAYNES,

1 F. & F. 666 [1859].

The prisoner, a soldier, was charged with the murder of Mary MacGowan, at the camp at Aldershott.

The deceased was an "unfortunate woman" with whom the prisoner had been intimate, and was on the most friendly terms up to the moment of the commission of the offence. No motive was assigned for the perpetration of the act; and general evidence was given that the prisoner, while in Canada, having seduced a young woman under a promise of marriage, which he had been unable to fulfil by reason of his regiment having been ordered home, his mind had been much affected by the circumstance.

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Bramwell, B. (*To the jury.*) As to the defence of insanity set up for the prisoner, I will read you what the law is as stated by the judges in answer to questions put to them by the House of Lords. (*Having done so.*) It has been urged for the prisoner that you

should acquit him on the ground, that it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence or homicidal tendency. But I must remark as to that that the circumstance of an act being *apparently* motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief; but if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence, — the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint, — that forbidding and punishing its perpetration. We must therefore return to the simple question you have to determine, — did the prisoner know the nature of the act he was doing; and did he know that he was doing what was wrong?[1]

Guilty. Sentence, death.

The prisoner was reprieved.

PEARSON'S CASE.

2 Lewin C. C. 144 [1835].

The prisoner was indicted for the murder of his wife.

It was proved that in a fit of drunkenness he had beaten her in a cruel manner with a rake-shank, and that she died of the wounds and bruises which she received. His only defence was that he was drunk.

Park, J. Voluntary drunkenness is no excuse for crime.

If a party be made drunk by stratagem or the fraud of another he is not responsible.

So drunkenness may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation.

[1] [See Flanagan *v.* People, 52 N. Y. 457.]

HOPT *v.* PEOPLE,

104 U. S. 631 [1881].

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MR. JUSTICE GRAY delivered the opinion of the Court.

The plaintiff in error was indicted, convicted, and sentenced for the crime of murder in the first degree in the District Court of the Third Judicial District of the Territory of Utah, and presented a bill of exceptions, which was allowed by the presiding judge, and from his judgment and sentence appealed to the Supreme Court of the Territory, and that court having affirmed the judgment and sentence, he sued out a writ of error from this court.

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At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence. United States *v.* Drew, 5 Mass. 28; United States *v.* McGlue, 1 Curt. 1; Commonwealth *v.* Hawkins, 3 Gray (Mass.), 463; People *v.* Rogers, 18 N. Y. 9. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the Supreme Judicial Court of Massachusetts in cases tried before a full court, one of which is reported upon other points (Commonwealth *v.* Dorsey, 103 Mass. 412); and in well-considered cases in courts of other States. Pirtle *v.* State, 9 Humph. (Tenn.) 663; Haile *v.* State, 11 id. 154; Kelly *v.* Commonwealth, 1 Grant (Pa.), Cas. 484; Keenan *v.* Commonwealth, 44 Pa. St. 55; Jones *v.* Commonwealth, 75 id. 403; People *v.* Belencia, 21 Cal. 544; People *v.* Williams, 43 id. 344; State *v.* Johnson, 40 Conn. 136, and 41 id. 584; Pigman *v.* State of Ohio, 14 Ohio, 555, 557. And the same rule is expressly enacted in the Penal Code of Utah, § 20: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Compiled Laws of Utah of 1876, pp. 568, 569.

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REGINA *v.* GAMLEN,

1 F. & F. 90 [1858].

Assault. The charge arose out of an affray at a fair, and there seemed some ground for supposing that the prisoner acted under apprehension of an assault upon himself. All concerned were drunk.

Crowder, J. Drunkenness is no excuse for crime; but in considering whether the prisoner apprehended an assault on himself you may take into account the state in which he was. *Not guilty.*

REGINA *v.* DOODY,

6 Cox C. C. 463 [1854].

The prisoner was indicted for unlawfully attempting to commit suicide at Wolverhampton, on the 5th of March, 1854.

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Wightman, J., told the jury that the offence charged constituted, beyond all doubt, a misdemeanor at common law. The question for them to consider was whether the prisoner had a mind capable of contemplating the act charged, and whether he did, in fact, intend to take away his life. The prisoner alleged in his defence that he was drunk at the time, which must be taken to mean that he had no deliberate intention to destroy his life; for the mere fact of drunkenness in this, as in other cases, is not of itself an excuse for the crime, but it is a material fact in order to arrive at the conclusion whether or no the prisoner really intended to destroy his life.

Verdict guilty. Sentence, three months' imprisonment.

COMMONWEALTH *v.* HAWKINS,

3 Gray, 463 [1855].

Indictment against James Hawkins and James Hicks for the murder of Alexander T. Leet. The first count duly charged the murder to have been committed by a stab in the heart with a dirk-knife held by Hawkins. The second count charged the murder to have been committed by blows of the fists of Hawkins and a wound with a metallic pitcher held by Hicks and a stab in the heart with a knife held by Hawkins, of which blows and wounds Leet died. The Attorney-

General entered a *nolle prosequi* as to Hicks; and Hawkins was tried on the 30th of May, 1855, before the Chief Justice and Justices Metcalf and Bigelow.

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The evidence was that, after insulting words had passed between Leet and Hawkins, who was somewhat under the influence of strong drink, they fought with their fists; and while they were fighting, Hicks struck Leet on the head with a pewter pitcher, and Leet knocked Hawkins down and struck him after he was down; and that a few minutes later (the evidence varying between eight minutes and a quarter of a hour), while Leet was washing the blood from the cut made by the pitcher, Hawkins came behind him and stabbed him in the heart with a dirk-knife, of which wound he died. The defendant's counsel did not controvert these facts; but contended that the blow with the knife was struck in the heat of blood, under the violence of passion excited by the previous combat and beating; and that the defendant was guilty of manslaughter only.

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[For the defendants it was] contended that if upon the evidence the jury were satisfied that there was mutual combat, or other provocation sufficient to reduce the homicide from murder to manslaughter, provided the fatal blow was struck in the heat of blood and paroxysm of anger thereby produced, so that they were called on to inquire whether, between the provocation and the crime, the defendant had reasonable time to cool, or did actually cool, it was proper for them to consider how far the defendant's intoxication had, or might have had, any effect in prolonging that paroxysm of anger.

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But the Chief Justice instructed the jury thus: The rule of law is, that although the use of intoxicating liquors does to some extent blind the reason and exasperate the passions, yet, as a man voluntarily brings it upon himself, he cannot use it as an excuse or justification or extenuation of crime. A man, because he is intoxicated, is not deprived of any legal advantage or protection; but he cannot avail himself of his intoxication to exempt him from any legal responsibility which would attach to him, if sober. *Verdict, guilty of manslaughter.*

REGINA *v.* DAVIS,

14 Cox C. C. 563 [1881].

WILLIAM DAVIS, thirty-eight, laborer, was charged with feloniously wounding his sister-in-law, Jane Davis, at Newcastle, on the 14th day of January, with intent to murder her.

On the 14th day of January, 1881, the prisoner (who had been previously drinking heavily, but was then sober) made an attack upon his sister-in-law, Mrs. Davis, threw her down, and attempted to cut her throat with a knife. Ordinarily he was a very mild, quiet, peaceable, well-behaved man, and on friendly terms with her. At the police station he said, "The man in the moon told me to do it. I will have to commit murder, as I must be hanged." He was examined by two medical men, who found him suffering from *delirium tremens*, resulting from over-indulgence in drink. According to their evidence he would know what he was doing, but his actions would not be under his control. In their judgment neither fear of punishment nor legal nor moral considerations would have deterred him; nothing short of actual physical restraint would have prevented him acting as he did. He was disordered in his senses and would not be able to distinguish between moral right and wrong at the time he committed the act. Under proper care and treatment he recovered in a week, and was then perfectly sensible.

For the defence it was submitted that he was of unsound mind at the time of the commission of the act, and was not responsible for his actions.

STEPHEN, J., to the jury. The prisoner at the bar is charged with having feloniously wounded his sister-in-law, Jane Davis, on the 14th day of January last, with intent to murder her. You will have to consider whether he was in such a state of mind as to be thoroughly responsible for his actions; and with regard to that I must explain to you what is the kind or degree of insanity which relieves a man from responsibility. Nobody must suppose — and I hope no one will be led for one moment to suppose — that drunkenness is any kind of excuse for crime. If this man had been raging drunk and had stabbed his sister-in-law and killed her, he would have stood at the bar guilty of murder beyond all doubt or question. But drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then

he would not be criminally responsible. In my opinion, in such a case the man is a madman and is to be treated as such, although his madness is only temporary. If you think he was so insane that if his insanity had been produced by other causes he would not be responsible for his actions, then the mere fact that it was caused by drunkenness will not prevent it having the effect which otherwise it would have had, of excusing him from punishment. Drunkenness is no excuse, but *delirium tremens* caused by drunkenness may be an excuse if you think it produces such a state of mind as would otherwise relieve him from responsibility. A person may be both insane and responsible for his actions, and the great test laid down in McNaughten's Case (10 Cl. & Fin. 200; 1 C. & K. 130 *n.*) was whether he did or did not know at the time that the act he was committing was wrong. If he did — even though he were mad — he must be responsible; but if his madness prevented that, then he was to be excused. As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, — any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong. *Delirium tremens* is not the primary but the secondary consequence of drinking, and both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him from the commission of the act. If you think there was a distinct disease caused by drinking, but differing from drunkenness, and that by reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the ground of insanity; but if you are not satisfied with that, you must find him guilty either of stabbing with intent to murder or to do grievous bodily harm.

The jury returned a verdict of Not Guilty on the ground of insanity.

The prisoner was ordered to be detained during Her Majesty's pleasure.

CHAPTER IV.

The Mental Element in Crime.

Ignorance or Mistake of Law; Ignorance or Mistake of Facts.

Section 1. Ignorance or Mistake of Law.

COMMONWEALTH *v.* STEBBINS,

8 Gray, 492 [1857].

Indictment on Rev. Sts. c. 126, § 17, for the larceny of "sundry bank bills current within said Commonwealth, amounting to the sum of $210 and of the value of $210, and one gold coin current within said Commonwealth of the denomination of two dollars and fifty cents and of the value of two dollars and fifty cents, of the goods and chattels and money of one Patrick Dorsay," at Springfield on the 18th of January, 1853. Trial in the Court of Common Pleas in Hampden at December term, 1856, before Morris, J., who signed a bill of exceptions, the material parts of which were as follows: —

The following facts appeared in evidence: In 1849 the defendant lent $200 in cash to Michael Dorsay in the presence of his son Patrick, and took his note therefor, payable on demand with interest. The money thus lent was used in keeping a shop in Holyoke by Patrick, in the name of Michael, who soon after died, leaving no will and no heirs but Patrick. No letters of administration were taken out upon his estate; but Patrick took all his property and appropriated it to his own use, and went to Middletown in Connecticut to reside. On the 18th of January, 1853, Patrick came from Middletown and passed the night in Springfield at the house of Jerry Whalen, where the defendant also then was. When Dorsay went to bed he placed under his pillow his pocket-book containing the bills and gold coin mentioned in the indictment. But one Dee, who was to sleep with Dorsay, insisting on having the money counted, Whalen took the pocket-book from under the pillow, and in the presence of Dee, of Dorsay, and the defendant counted the money upon a table near the bed. Immediately after it was counted the defendant took the bank bills and refused to give them up, saying "that she had a right to it; that she had been looking for it a long time and now she had got it; that the old man owed her and

now it was time for her to get her own." When she took the bills no part of Michael Dorsay's note which she held had been paid.

The Court instructed the jury that Michael Dorsay's property descended to Patrick subject to the payment of debts; that Patrick was an executor in his own wrong, and as such was liable on the claim held by the defendant against Michael Dorsay to the extent of his intermeddling with his father's estate; and that the defendant would not be guilty of larceny if the jury were satisfied that she took this money under an honest belief that she had a legal right to take this specific money in the way and under the circumstances that she did take it, although in fact she may have had no such legal right.

. . . . . .

METCALF, J. 1. The instruction to the jury that the defendant was not guilty of larceny if she took the money under an honest belief that she had a legal right to take it was clearly unexceptionable.

. . . . . .

REGINA *v.* TOWSE,

14 Cox C. C. 327 [1879].

PRISONER was indicted for having set fire to some furze growing on a common at Culmstock.

It appeared from the evidence that persons living near the common had occasionally burnt the furze to improve the growth of the grass, although the existence of any right to do this was denied.

But the prisoner in this case denied having set the furze on fire at all.

Bullen, for the defence, contended that even if it were proved that the prisoner set the furze on fire she could not be found guilty if it appeared that she *bona fide* believed she had a right to do so, whether the right were a good one or not.

LOPES, J. If she set fire to the furze thinking she had a right to do so that would not be a criminal offence. I shall leave two questions to the jury. 1. Did she set fire to the furze? 2. If yes, did she do it wilfully and maliciously?

REX *v.* HALL,

3 C. & P. 409 [1828].

INDICTMENT for robbing John Green, a gamekeeper of Lord Ducie, of three hare wires and a pheasant. It appeared that the prisoner had set three wires in a field belonging to Lord Ducie, in one of which this

pheasant was caught, and that Green, the gamekeeper, seeing this, took up the wires and pheasant and put them into his pocket; and it further appeared that the prisoner soon after this came up and said, "Have you got my wires?" The gamekeeper replied that he had and a pheasant that was caught in one of them. The prisoner then asked the gamekeeper to give the pheasant and wires up to him, which the gamekeeper refused; whereupon the prisoner lifted up a large stick and threatened to beat the gamekeeper's brains out if he did not give them up. The gamekeeper, fearing violence, did so.

Maclean, for the prosecution, contended that by law the prisoner could have no property in either the wires or the pheasant, and as the gamekeeper had seized them for the use of the lord of the manor, under the statute 5 Anne c. 14, § 4, it was a robbery to take them from him by violence.

VAUGHAN, B. I shall leave it to the jury to say whether the prisoner acted on an impression that the wires and pheasant were his property; for however he might be liable to penalties for having them in his possession, yet if the jury think that he took them under a *bona fide* impression that he was only getting back the possession of his own property, there is no *animus furandi*, and I am of opinion that the prosecution must fail. *Verdict, not guilty.*

SECTION 2. IGNORANCE OR MISTAKE OF FACTS.

LEVET'S CASE,

1 HALE P. C. 42.

IN the case of *Levet*, indicted for the death of *Frances Freeman*, the case was, that *William Levet* being in bed and asleep in the night, his servant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night, the servant going to let out *Frances* thought she heard thieves breaking open the door; she therefore ran up speedily to her master and informed him that she thought thieves were breaking open the door. The master rising suddenly and taking a rapier ran down suddenly; *Frances* hid herself in the buttery lest she should be discovered. *Levet's* wife spying *Frances* in the buttery cried out to her husband, "*Here they be that would undo us.*" *Levet* runs into the buttery in the dark, not knowing *Frances* but thinking her to be a thief, and thrusting with his rapier before him hit *Frances* in the breast mortally, whereof she instantly died. This was resolved to be neither murder nor manslaughter nor felony.

REGINA *v.* BISHOP,

14 Cox C. C. 404; 15 Q. B. D. 259 [1880].

CASE reserved for the opinion of this court by STEPHEN, J.

Rhoda Hulse Bishop was tried before me at Northampton on the 20th and 21st days of January, upon an indictment charging her with an offence against the 44th section of 8 & 9 Vict. c. 100, by receiving into her house two or more lunatics, such house not being an asylum or hospital registered under the Act, or a house duly licensed under the Act.

It was proved on the trial that the defendant received into her house several young women for the purpose of medical treatment. Her step-daughter, who was called as a witness on her behalf and who took part in the management of the house, described them as patients suffering from "hysteria, nervousness, and perverseness," and it was proved that she advertised in newspapers for patients so described. She had besides these patients one inmate who was admitted to be a lunatic, with regard to whom she had complied with the requisitions of § 90 of the Act.

There was conflicting evidence upon the question whether any of the other patients were lunatics or not, and as to the nature and degree of restraint to which they were subjected, and there was strong evidence to show that the defendant believed in good faith and on reasonable grounds that no one of them was a lunatic, but that all were suffering only under "hysteria, nervousness, or perverseness."

I read to the jury the interpretation of "lunatic" given in § 114: "Lunatic shall mean every insane person, and every person being an idiot, or lunatic, or of unsound mind," and I told them that in my opinion these words would include everyone whose mind was so affected by disease that it was necessary for his own good to put him under restraint.

I also told them that in my opinion the words "receive one or more lunatics" meant receive "as lunatics, and in order to be treated as lunatics are treated in asylums," and I gave them this direction: "In order that the defendant may be convicted the jury must be of opinion that at least one other patient in the house besides the admitted lunatic was either an insane person or an idiot or a lunatic or of unsound mind when received, and that such person was received into the house to be treated as a lunatic is treated in an asylum."

I also told them that I was of opinion that if one other such person besides the admitted lunatic was so received, an honest belief on the

part of the defendant that that person was not a lunatic would be immaterial; but at the request of the counsel for the defendant I asked them if they convicted the defendant to find specially whether she believed honestly and on reasonable grounds that any person so received was not a lunatic.

The jury found the defendant guilty, but they found that she did honestly and on reasonable grounds believe that no one of her patients was a lunatic (except of course the admitted lunatic).

I directed the defendant to enter into her own recognizances to come up for judgment if called upon in order that she might have an opportunity of complying with the provisions of the Act, but I reserved for the determination of the Court for Crown Cases Reserved the question whether my direction to the jury was right, in order that if it is wrong the conviction may be set aside.

J. F. STEPHEN.

8 & 9 Vict. c. 100 (An Act for the Regulation of the Care and Treatment of Lunatics), § 44: —

It shall not be lawful for any person to receive two or more lunatics into any house unless such house shall be an asylum or an hospital registered under this Act, or a house for the time being duly licensed under this Act, or one of the Acts hereinbefore repealed; and any person who shall receive two or more lunatics into any house other than a house for the time being duly licensed, or an asylum or an hospital duly registered shall be guilty of a misdemeanor.

Section 90: —

No person (unless he be a person who derives no profit from the charge, or a committee appointed by the Lord Chancellor) shall receive to board or lodge in any house other than an hospital registered under this Act, or an asylum or a house licensed under this Act, or under one of the Acts hereinbefore repealed, or take the care or charge of any one patient as a lunatic or alleged lunatic without the like order and medical certificates in respect of such patient as are hereinbefore required on the reception of a patient (not being a pauper) into a licensed house, etc.

. . . . . .

POLLOCK, B. I agree that the conviction ought to be sustained, and I wish it to be understood that we affirm the direction of my brother STEPHEN that the word "lunatic" would include a person whose mind was so affected by disease that it was necessary for his own good to put him under restraint, in the sense that by restraint is meant restraint of the same kind as that to which lunatics are subject in asylums. . . . With regard to the point whether the knowledge or absence of knowledge of the keeper of the house as to the lunacy of the persons received is material, I am clearly of opinion that it is not.

. . . . . .

STEPHEN, J. I am of the same opinion. Upon the question whether knowledge upon the part of the defendant was essential to the committal of the offence under the Act I entertained no doubt at the trial, and I do not now.

. . . . . .

Conviction affirmed.

COMMONWEALTH *v.* MASH,

7 MET. 472 [1844].

THE defendant was indicted, on the Rev. Sts. c. 130, § 2, for marrying a second husband while her former husband was living.

At the trial in the municipal court, at August term, 1843, there was evidence tending to prove that the defendant was married to Peter Mash on the 7th of December, 1834, and that she afterwards cohabited with him until about the 10th of November, 1838, when he left home in the morning, saying he should return to breakfast, and was not afterwards heard from by the defendant till about the middle of May, 1842, when he returned; that on the 10th of April, 1842, she was married in Boston by a clergyman of competent authority to solemnize marriages in this Commonwealth, to William M. Barrett, with whom she cohabited in Boston until she heard that said Peter Mash was still living, when she immediately withdrew from said Barrett, and had no intercourse with him afterwards; that she was of uniformly good character and virtuous conduct, and that she honestly believed, at the time of said second marriage, that said Peter Mash was dead; that during his absence, as aforesaid, she made many inquiries, and was unable to obtain any information concerning him, or to ascertain whether he was or was not alive.

The counsel for the defendant moved the Court to instruct the jury, that if they believed all the facts which the aforesaid evidence tended to prove, she was entitled to an acquittal. But the Court refused so to instruct the jury, and instructed them that the defendant's ignorance that her said husband Peter Mash was alive and her honest belief that he was dead constituted no legal defence.

The jury found the defendant guilty, and she filed exceptions to the instruction of the Court.

SHAW, C. J. The Court are of opinion that the instruction to the jury was right. The rule of law was certainly strongly expressed by the judge, no doubt in consequence of the terms in which the motion of the defendant's counsel was expressed. The rule as thus laid down in effect was, that a woman whose husband suddenly left her without

notice, and saying when he went out that he should return immediately, and who is absent between three and four years, though she have made inquiry after him and is ignorant of his being alive, but honestly believes him to be dead, if she marries again, is guilty of polygamy. The correctness of this instruction must of course depend upon the construction of the Rev. Sts. c. 130, which regulate this subject. The 2d section imposes a penalty upon any person who, having a former husband or wife, shall marry another person, with some exceptions. The 3d section excepts from the operation of the statute "any person whose husband or wife shall have been continually remaining beyond sea, or shall have voluntarily withdrawn from the other and remained absent for the space of seven years together, the party marrying again not knowing the other to be living within that time."

It appears to us that in a matter of this importance, so essential to the peace of families and the good order of society, it was not the intention of the law to make the legality of a second marriage, whilst the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death. Such belief might arise after a very short absence. But it appears to us that the legislature intended to prescribe a more exact rule, and to declare as law that no one should have a right upon such ignorance that the other party is alive, or even upon such honest belief of his death, to take the risk of marrying again, unless such belief is confirmed by an absence of seven years, with ignorance of the absent party's being alive within that time. It is analogous to other provisions and rules of law, by which a continued absence of a person for seven years, without being heard of, will constitute a presumption of his death. Loring *v.* Steineman, 1 Met. 204; Greenl. on Ev. § 41.

We are strongly confirmed in this construction of the statute, and that such was the deliberate expression of the legislative will, by reference to the report of the commissioners for revising the statutes. It appears by their report upon this provision that they prescribed a much more mitigated rule, and proposed to extend the exception "to any person whose former husband or wife, having been absent one year or more at the time of such second marriage, shall be believed to be dead." This proposal was stricken out by the committee appointed to consider the report of the commissioners, and the legislature adopted their amendment and passed the law as it stands, without the proposed additional exception. This shows at least that the attention of the legislature was called to the subject, and that it was by design, and not through inadvertence, that the law was framed as it is.

It was urged in the argument that where there is no criminal intent, there can be no guilt; and if the former husband was honestly believed

to be dead, there could be no criminal intent. The proposition stated is undoubtedly correct in a general sense; but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does, he of course intends to do. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it. On this subject the law has deemed it so important to prohibit the crime of polygamy, and found it so difficult to prescribe what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact; and as the same vague evidence might create a belief in one mind and not in another, the law has also deemed it wise to fix a definite period of seven years' continued absence, without knowledge of the contrary, to warrant a belief that the absent person is actually dead. One therefore who marries within that time, if the other party be actually living, whether the fact is believed or not, is chargeable with that criminal intent, by purposely doing that which the law expressly prohibits.

Exceptions overruled.

[The Court did not pass sentence on the defendant, but took a recognizance for her appearance in court at a future day. On the 9th of July, 1844, the defendant received a full pardon from the governor, which she brought into court on the 15th of said July and pleaded the same in bar of sentence. Whereupon the Court ordered her to be discharged. [1]

SQUIRE *v.* THE STATE,[2]

46 INDIANA, 459 [1874].

. . . . . .

BUSKIRK, J. This was a prosecution for bigamy. The appellant, upon a plea of not guilty, was tried by a jury and found guilty, and

[1] [The Queen *v.* Tolson, 23 Q. B. D. 168. The prisoner was convicted under 24 & 25 Vict. c. 100, § 57, of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead.

Held, by Lord Coleridge, C. J., Hawkins, Stephen, Cave, Day, A. L. Smith, Wills, Grantham, and Charles, JJ. (Denman, Field, and Manisty, JJ., and Pollock and Huddleston, BB., dissenting), that a *bona fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong.]

[2] [If any person being married shall marry again, the former husband or wife being alive and the bond of matrimony still undissolved and no legal presumption of death having arisen, such person so offending shall be deemed guilty of bigamy," etc. Sect. 46, 2 Gavin & Hord (Indiana Statutes), 452.]

over motions for a new trial and in arrest judgment was rendered on the verdict.

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The motion for a new trial was based upon the admission of incompetent evidence, the insufficiency of the evidence to support the verdict, and the refusal of the Court to give certain instructions asked by the appellant.

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The appellant requested the Court to give the following instruction: "That if the jury believe from all the evidence in the case that the defendant married the second time in the honest belief that his former wife had been divorced from him, they should find him not guilty;" but the Court refused to so charge, and this refusal was assigned as a reason for a new trial and is relied upon here to reverse the judgment.

The appellant testified in his own behalf. The substance of his testimony was, that he left the State of New York about two years ago and came to this State, where he had resided ever since; that he left his wife in the city of Buffalo, in the State of New York, she refusing to come West with him; that he came to Washington, Daviess County, Indiana, in July, 1873, where he had ever since resided and still resides; that he had not been in the State of New York since he left there, two years ago, but he had received letters from his parents and brothers in the State of New York informing him that his wife Elizabeth had procured a divorce from him in said State of New York; and that he had married the said Ruth Summers under the belief that such information was true.

Bishop on Criminal Law, in sect. 303, vol. i., p. 187, says: "The wrongful intent being the essence of every crime, the doctrine necessarily follows that, whenever a man is misled without his own fault or carelessness concerning facts, and while so misled acts as he would be justified in doing were the facts what he believes them to be, he is legally innocent the same as he is innocent morally."

The same author in his work on Statutory Crimes in sect. 355, p. 234, says: "In the cases mentioned in the preceding sections there is no crime because, by a rule of the common law, there can be none where the criminal mind is wanting. But the reason why it is wanting in these cases is, that either in consequence of a technical rule or by force of a natural fact, it is impossible the criminal mind should exist; since that cannot be for whose existence there is no capacity. But there may be a capacity for the criminal intent while yet no crime is committed, even though the outward fact of what otherwise were crime transpires. It is so where one, having a mind free from all moral culpability, is misled concerning facts. If in such a case he honestly

believes certain facts to exist, and though they do not, acts as he would be legally justified in acting if what he erroneously believes to be were real, he is justified in law the same as he is in morals. The books are full of illustrations of this doctrine, and the reader perceives that in reason it must govern statutory crimes the same as crimes at the common law."

The same author in sect. 356 illustrates the above doctrine as applicable to a prosecution for bigamy when he says: "But this exception has no relation to a case in which, on independent information and special grounds, a husband or wife is really believed to be dead. Suppose, for example, a husband intending to entrap his wife goes out ostensibly on a sail with confederates, and they come back and represent that he is drowned, while he secretly escapes abroad; she believes the statement, administers on his effects, and at the end of a year marries. Then he returns and procures her indictment for polygamy. On a just consideration the common-law rule and not the statutory one prevails, and she should be acquitted."

The same rule would apply to the dissolution of the marriage relation by divorce as by death.

We think the Court should have charged the jury, if it had been so asked, that if they believed from the evidence that the defendant had been informed that his wife had been divorced, and that he had used due care and made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe and did believe at the time of his second marriage that his former wife had been divorced from him, they should find him not guilty.

There was probably no error in refusing the instruction as asked, as it was based solely upon the belief of the defendant, and did not require that such belief should be the result of due care and careful inquiry, and that he should have reasonable grounds to entertain such belief.

CHAPTER V.

The Mental Element in Crime.

Intent to do Wrong. Religious Convictions.

REX v. JAMES OGDEN,

6 C. & P. 631.

The prisoner was indicted for unlawfully transposing and removing from one piece of wrought plate to another, namely, from one gold ring to another, the lion passant, contrary to the statutes.[1]

The principal evidence to affect the prisoner was his own statement at Goldsmiths' Hall, in answer to questions put to him by the prime warden of the company, and also his examination at Hatton Garden Police Office. On the whole of the facts, it appeared that the prisoner, who was a working jeweller, was employed by a regular customer, named Beeby, to make a gold ring of a particular size and weight. When it was sent home it was found to require alteration, and was sent back. Mr. Beeby, who was called as a witness for the prosecution, stated that he could not say that the ring when first sent home had not the hall mark upon it, but he was inclined to think that it had. The deputy touchwarden of the Goldsmiths' Company proved that the marks of the lion passant and the small Roman T, denoting the date, had been transferred from another ring to that in question. The prisoner's account of the transaction given on the 6th of November, when he was first taken before the magistrate, was as follows: . . . "The ring being shown to the prisoner, and he being asked whether he had anything to say, his answer was, 'It was sent to me to be made by Mr. Beeby, of Red Lion Street, a spoon-maker. I made it and sent it home. It was returned to me to make heavier and a little smaller, and in doing so I obliterated the hall mark; and the parties sending to me that the ring must be sent home that day, I destroyed another ring, and put the hall mark of it into this ring.'" On the next day, the 7th, the prisoner was brought up again, and he then said, "The ring now produced is a genuine ring; it has been

[1] 13 Geo. 3, c. 52, § 14, and 38 Geo. 3, c. 69, § 7. The words used in both those statutes are "transpose or remove, or cause to be transposed or removed, from one piece of wrought plate to another, or" etc.

stamped at the hall; it was sent there with my work." This statement was returned with the depositions, and dated as if it had been made on the 6th.

. . . . . .

BOLLAND, B. (in summing up), said: By the act referred to, the Goldsmiths' Company are bound to have a certain mark, and there is no doubt that the prisoner made the ring in question, and there is no doubt also that the mark has been transposed from some other ring. The statement of the prisoner, which was read from the book, ought certainly to have been returned with the other depositions; for what is said by a prisoner is a part of the examination, and ought to be returned by the magistrate. But notwithstanding this irregularity, I cannot say that it is not evidence. There is no proof that the ring is not genuine gold; if there had been it would be a more obvious sign of fraud than the merely saving the duty. We must therefore take it that there has been no fraud on the part of the prisoner, as far as the substituting an inferior kind of metal for genuine is concerned. The question is, whether the prisoner has been guilty of transposing the hall mark of the company from one piece of wrought plate to another.

The prisoner received an excellent character from many witnesses, and the jury delivered their verdict in the following words: "We find him guilty of transposing the hall mark from one genuine ring to another genuine ring; but without any fraudulent intention."

BOLLAND, B. There are no words in the act of Parliament referring to any fraudulent intention. The words of it are, "shall transpose or remove, or cause or procure to be transposed or removed, from one piece of wrought plate to another." Unfortunately for the prisoner, I fear it can be only a verdict of guilty; but I will make a minute of it for further consideration.

The jury then found the defendant guilty, but most strongly recommended him to mercy, and the Goldsmiths' Company joined in the recommendation.

PARK, J. The statute is express; the Court has no power to mitigate the sentence.

It was intimated that the recommendations would be forwarded to the proper quarter.[1]

[1 The prisoner received pardon.]

REYNOLDS *v.* UNITED STATES,

98 U. S. 145 [1878].

Error to the Supreme Court of the Territory of Utah.

This is an indictment found in the District Court for the third judicial district of the Territory of Utah, charging George Reynolds with bigamy, in violation of § 5352 of the Revised Statutes, which, omitting its exceptions, is as follows: —

"Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years."

. . . . . .

Mr. Chief Justice Waite delivered the opinion of the Court.

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5. As to the defence of religious belief or duty.

On the trial the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church "that it was the duty of male members of said church, circumstances permitting, to practise polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." He also proved "that he had received permission from the recognized authorities in said church to enter into polygamous marriage; . . . that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed, to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the doctrines of said church."

Upon this proof he asked the Court to instruct the jury that if they found from the evidence that he "was married as charged, if he was married in pursuance of and in conformity with what he believed at the time to be a religious duty, the verdict must be 'not guilty.'" This request was refused, and the Court did charge "that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right, under an inspiration, if you please, that it was right, deliberately married a second time, having a first wife living, the want of consciousness of evil intent, the want of understanding on his part that he was committing a crime did not excuse him; but the law inexorably in such case implies the criminal intent."

Upon this charge and refusal to charge the question is raised whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word "religion" is not defined in the Constitution. We must go elsewhere therefore to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed?

Before the adoption of the Constitution attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed against their will for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session, and

directed that the bill should be published and distributed, and that the people be requested "to signify their opinion respecting the adoption of such a bill at the next session of assembly."

This brought out a determined opposition. Among others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session the proposed bill was not only defeated, but another "for establishing religious freedom," drafted by Mr. Jefferson, was passed. 1 Jeff. Works, 45; 2 Howison, Hist. of Va. 298. In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the Church and what to the State.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. 1 Jeff. Works, 79. Five of the States, while adopting the Constitution, proposed amendments. Three — New Hampshire, New York, and Virginia — included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association (8 id. 113), took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or

his worship; that the legislative powers of the government reach actions only and not opinions, — I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and until the establishment of the Mormon Church was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the

preamble, "it hath been doubted whether bigamy or polygamy be punishable by the laws of this Commonwealth." 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people to a greater or less extent rests. Professor Lieber says polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (*e*). An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead

husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married and that his first wife was living. He also knew that his second marriage was forbidden by law. When therefore he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only.

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REGINA *v.* WAGSTAFFE,

10 Cox C. C. 530 [1868].

The prisoners were indicted for the manslaughter of Lois Wagstaffe, their child, by neglecting to provide for it proper medical attendance.

The deceased child was very young, and had been ill for some time. It had always been delicate, especially in the region of the lungs, and in its last illness, the defendants, instead of calling in a doctor, anointed it two or three times and prayed to the Lord.

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Defendants belonged to a sect calling themselves "Peculiar People," one of whose tenets was not to call in a surgeon in cases of illness, but to trust to Providence.

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Willes, J., in summing up to the jury, said that in order to make out the offence of manslaughter in a case of this description, the proposition to be established was that the prisoners had the charge of the child in question, who would from its tender age not be able to care for itself;

that they had the means of providing things reasonably fit for it, and that they were guilty of gross and culpable negligence in not resorting to those means for its benefit, by lack of which its death was occasioned. The question was whether the jury were satisfied on the evidence that the child came by its death by the gross and culpable negligence of its parents, and that was a very wide question. If a parent had the means of supplying his child with food and were to keep it starving, even under a notion that he had some religious duty imposed upon him to starve it, and if it could be made out that that was an insane and morbid belief, everybody would come to the conclusion that there must be a conviction, for all the reasoning in the world would not justify a man in starving a child to death. But when a jury had to consider what was the precise medical treatment to be applied to a particular case, they got into a much higher latitude indeed. At different times people had come to different conclusions as to what might be done with a sick person. Two hundred years ago, if a child was afflicted with the king's evil, the popular feeling was, regardless of medical science, to have it touched with the royal hand, because that might result in effecting a cure. Again, in some Catholic countries, a custom obtained of taking a child laboring under a disease to a particular shrine, under a belief that that was the best course to adopt with a view to effect a cure. In such cases a man might be convicted of manslaughter because he lived in a place where all the community was of a contrary opinion, and in another he might be acquitted because they were all of his opinion. There was a very great difference between neglecting a child in respect to food, with regard to which there could be but one opinion, and neglect of medical treatment, as to which there might be many opinions. If a man did his best according to his knowledge with respect to food, it would be for a jury to consider whether they would stamp his conduct with the imputation of gross and culpable negligence. An opinion might be so absurd in itself that it could not have been honestly obtained, and when that was the case, of course all pretence of having acted for the best, because that was considered to be a matter of faith, would be removed from the case. But in the case of an opinion merely put forward as a blind or a screen for misconduct, of course the good sense of a jury would treat it as if no such belief was suggested. He thought it right to read, or rather to remind the jury of, the text in the last chapter of the General Epistle of St. James, on which the views of persons like the defendants were founded: "Is any sick among you? let him call for the elders of the church; and let them pray over him, anointing him with oil in the name of the Lord; and the prayer of faith shall save the sick, and the Lord shall raise him up; and if he have committed sins, they shall be forgiven him." It was only right to refer

to that, and he thought he might go so far as to say the construction put upon that verse by the prisoners — and he spoke with profound respect for any belief honestly entertained in religious matters — was as sensible and reasonable as supposing a man broke his leg it would be absurd to call in the elders of the church and anoint with oil. Was it intended by God Almighty that persons should content themselves by praying for his assistance without helping themselves, or resorting to such means as were within their reach for that purpose? He stated the case of a man breaking his leg. He did not believe the prisoners held dishonestly the belief they professed. The jury had evidence on that subject, and he thought they would be of opinion that they did not act with any dishonesty in the matter. He thought, on the contrary, this was a case where affectionate parents had done what they thought the best for a child, and had given it the best of food.

Not guilty.

REGINA *v.* DOWNES,

13 Cox C. C. 111 [1875].

COURT OF CRIMINAL APPEAL.

Case reserved for the opinion of this Court by Blackburn, J.

1. The prisoner was indicted at the Central Criminal Court for the manslaughter of Charles Downes.

2. It appeared on the trial before me by the evidence that Charles Downes was an infant who at the time of his death was a little more than two years old. The child had been ill and wasting away for eight or nine months before its death. The prisoner, who resided at Woolwich, was the father of the deceased, and had during the whole of this time the custody of the child.

3. The prisoner was one of a sect who called themselves "The Peculiar People."

4. During the whole period of the child's illness he did not procure any skilled advice as to the treatment of the child, but left it to the charge of women who belonged to his sect, and called in at intervals George Hurry, an engine driver, who prayed over the child, and anointed it with oil.

5. The reason of this course of conduct was explained by George Hurry, who was called as a witness.

6. He stated that the Peculiar People never call in medical advice or give medicines in case of sickness. They had religious objections to doing so. They called in the elders of the church, who prayed over

the sick person, anointing him with oil in the name of the Lord. This he said they did in literal compliance with the directions in the 14th and 15th verses of the fifth chapter of the Epistle of St. James, and in hope that the cure would follow.

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Coleridge, C. J. I think that this conviction should be affirmed. For my own part, but for the statute 31 & 32 Vict. c. 122, § 37, I should have much doubt about this case, and should have desired it to be further argued and considered. Perhaps it is enough to say that the opinions of Willes, J., and Pigott, B., are deserving of grave consideration. The Statute 31 & 32 Vict. c. 122, § 37, however, is a strong argument in favor of the conviction. By that enactment it is made an offence punishable summarily if any parent wilfully neglects to provide (*inter alia*) medical aid for his child being in his custody under the age of fourteen years, whereby the health of such child shall have been or shall be likely to be seriously injured. That enactment I understand to mean that if any parent intentionally, *i. e.*, with the knowledge that medical aid is to be obtained, and with a deliberate intention abstains from providing it, he is guilty of an offence. Under that enactment upon these facts the prisoner would clearly have been guilty of the offence created by it. If the death of a person results from the culpable omission of a breach of duty created by the law, the death so caused is the subject of manslaughter. In this case there was a duty imposed by the statute on the prisoner to provide medical aid for his infant child, and there was the deliberate intention not to obey the law, — whether proceeding from a good or bad motive is not material. The necessary ingredient to constitute the crime of manslaughter existed, therefore, in this case, and for that reason this conviction ought to be affirmed.

Bramwell, B. I am of the same opinion. The 31 & 32 Vict. c. 122, § 37, has imposed a positive and absolute duty on parents, whatever their conscientious or superstitious opinions may be, to provide medical aid for their infant children in their custody. The facts show that the prisoner thought it was irreligious to call in medical aid, but that is no excuse for not obeying the law.

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[Mellor, J.], Grove, J., and Pollock, B., concurred.

Conviction affirmed.[1]

[1] [As to the common-law liability for neglect, see Regina v. Friend, Russ. & Ry. C. C. 20; Regina v. Conde, 10 Cox C. C. 547; Rex v. Nicholls, 13 Cox C. C. 75.]

CHAPTER VI.

The Mental Element in Crime.

Wrongful Intent, but no Intent to do the Specific Act.

COMMONWEALTH *v.* MINK,

123 Mass. 422 [1877].

Indictment for the murder of Charles Ricker at Lowell, in the County of Middlesex, on August 31, 1876. Trial before Ames and Morton, JJ., who allowed a bill of exceptions in substance as follows: —

It was proved that Charles Ricker came to his death by a shot from a pistol in the hand of the defendant. The defendant introduced evidence tending to show that she had been engaged to be married to Ricker; that an interview was had between them at her room, in the course of which he expressed his intention to break off the engagement and abandon her entirely; that she thereupon went to her trunk, took a pistol from it, and attempted to use it upon herself, with the intention of taking her own life; that Ricker then seized her to prevent her from accomplishing that purpose, and a struggle ensued between them; and that in the struggle the pistol was accidentally discharged, and in that way the fatal wound inflicted upon him.

The jury were instructed on this point as follows: "If you believe the defendant's story, and that she did put the pistol to her head with the intention of committing suicide, she was about to do a criminal and unlawful act, and that which she had no right to do. It is true, undoubtedly, that suicide cannot be punished by any proceeding of the courts for the reason that the person who kills himself has placed himself beyond the reach of justice and nothing can be done. But the law nevertheless recognizes suicide as a criminal act, and the attempt at suicide is also criminal. It would be the duty of any bystander who saw such an attempt about to be made, as a matter of mere humanity, to interfere and try to prevent it. And the rule is, that if a homicide is produced by the doing of an unlawful act, although the killing was the last thing that the person about to do it had in his mind, it would be an unlawful killing, and the person would incur the responsibility which attaches to the crime of manslaughter.

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GRAY, C. J. The life of every human being is under the protection of the law and cannot be lawfully taken by himself or by another with his consent except by legal authority. By the common law of England suicide was considered a crime against the laws of God and man, the lands and chattels of the criminal were forfeited to the King, his body had an ignominious burial in the highway, and he was deemed a murderer of himself and a felon, *felo de se.*

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Since it has been provided by statute that "any crime punishable by death or imprisonment in the State prison is a felony and no other crime shall be so considered," it may well be that suicide is not technically a felony in this Commonwealth. Gen. Sts. c. 168, § 1; St. 1852, c. 37, § 1. But being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal. Every one has the same right and duty to interpose to save a life from being so unlawfully and criminally taken that he would have to defeat an attempt unlawfully to take the life of a third person. FAIRFAX, J., in 22 E. IV. 45, pl. 10; Marler *v.* Ayliffe, Cro. Jac. 134; 2 Rol. Abb. 559; 1 Hawk. c. 60, § 23. And it is not disputed that any person who, in doing or attempting to do an act which is unlawful and criminal, kills another, though not intending his death, is guilty of criminal homicide and at the least of manslaughter.

The only doubt that we have entertained in this case is whether the act of the defendant in attempting to kill herself was not so malicious, in the legal sense, as to make the killing of another person in the attempt to carry out her purpose murder, and whether the instructions given to the jury were not therefore too favorable to the defendant.

Exceptions overruled.

REGINA *v.* FRANKLIN,

15 Cox C. C. 163.

CHARLES HARRIS FRANKLIN was indicted before Field, J., at Lewes for the manslaughter of Craven Patrick Trenchard.

The facts were as follows: —

On the morning of the 25th day of July, 1882, the deceased was bathing in the sea from the West Pier, at Brighton, and swimming in the deep water around it. The prisoner took up a good-sized box from the refreshment stall on the pier and wantonly threw it into the sea. Unfortunately the box struck the deceased, C. P. Trenchard, who was at that moment swimming underneath, and so caused his death.

Gore, for the prosecution, urged that it would, apart from the question of negligence, be sufficient to constitute the offence of manslaughter that the act done by the prisoner was an unlawful act, which the facts clearly showed it to be.

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Field, J. I am of opinion that the case must go to the jury upon the broad ground of negligence and not upon the narrow ground proposed by the learned counsel, because it seems to me . . . that the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case. I have a great abhorrence of constructive crime . . . The civil wrong against the refreshment-stall keeper is immaterial to this charge of manslaughter.

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It was not disputed that the prisoner threw the box over the pier, that the box fell upon the boy, and the death of the boy was caused by the box falling upon him.

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Field, J., in summing up the case to the jury, went carefully through the evidence, pointing out how the facts as admitted and proved affected the prisoner upon the legal question as he had explained it to them.

The jury returned a verdict of guilty of manslaughter.

REGINA *v.* FAULKNER,

13 Cox C. C. 550 [1877].

COURT OF CROWN CASES RESERVED. (IRELAND.)

Case reserved by Lawson, J., at the Cork Summer Assizes, 1876, the prisoner was indicted for setting fire to the ship "Zemindar," on the high seas, on the 26th day of June, 1876. The indictment was as follows: "That Robert Faulkner, on the 26th day of June, 1876, on board a certain ship called the 'Zemindar,' the property of Sandback, Tenne, & Co., on a certain voyage on the high seas, then being on the high seas, feloniously, unlawfully, and maliciously, did set fire to the said ship 'with intent thereby to prejudice the said' (these words were struck out at the trial by the learned judge, and the following words inserted, 'called the "Zemindar," the property of') Sandback, Tenne, & Co., and that the said Robert Faulkner, on the day and year aforesaid, on board a certain ship called the 'Zemindar,' being the property

of Sandback, Parker and others, on a certain voyage on the high seas, then being upon the high seas, feloniously, unlawfully, and maliciously did set fire to the said ship, with intent thereby to prejudice the said Sandback, Parker, and other, the owners of certain goods and chattels then laden, and being on board said ship." It was proved that the "Zemindar" was on her voyage home with a cargo of rum, sugar, and cotton, worth £50,000; that the prisoner was a seaman on board; that he went into the forecastle hold, opened the sliding door in the bulk head, and so got into the hold where the rum was stored; he had no business there, and no authority to go there, and went for the purpose of stealing some rum; that he bored a hole in the cask with a gimlet; that the rum ran out; that when trying to put a spile in the hole out of which the rum was running, he had a lighted match in his hand; that the rum caught fire; that the prisoner himself was burned on the arms and neck; and that the ship caught fire and was completely destroyed. At the close of the case for the Crown, counsel for the prisoner asked for a direction of an acquittal on the ground that on the facts proved the indictment was not sustained, nor the allegation that the prisoner had unlawfully and maliciously set fire to the ship proved. The Crown contended that inasmuch as the prisoner was at the time engaged in the commission of a felony, the indictment was sustained, and the allegation of the intent was immaterial.

At the second hearing of the case before the Court for Crown Cases Reserved, the learned judge made the addition of the following paragraph to the case stated by him for the court.

"It was conceded that the prisoner had no actual intention of burning the vessel, and I was not asked to leave any question to the jury as to the prisoner's knowing the probable consequences of his act, or as to his reckless conduct."

The learned judge told the jury that although the prisoner had no actual intention of burning the vessel, still if they found he was engaged in stealing the rum, and that the fire took place in the manner above stated, they ought to find him guilty. The jury found the prisoner guilty on both counts, and he was sentenced to seven years penal servitude. The question for the court was whether the direction of the learned judge was right; if not, the conviction should be quashed.

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O'Brien, J. I am also of opinion that the conviction should be quashed, and I was of that opinion before the case for our consideration was amended by my brother Lawson. I had inferred from the original case that his direction to the jury was to the effect now expressly stated by amendment, and that, at the trial, the Crown's counsel conceded that the prisoner had no intention of burning the vessel or of igniting

the rum, and raised no questions as to the prisoner's imagining or having any ground for supposing that the fire would be the result or consequence of his act in stealing the rum. With respect to Regina *v.* Pembliton (12 Cox C. C. 607), it appears to me there were much stronger grounds in that case for upholding the conviction than exist in the case before us. In that case the breaking of the window was the act of the prisoner. He threw the stone that broke it; he threw it with the unlawful intent of striking some one of the crowd about, and the breaking of the window was the direct and immediate result of his act. And yet the Court unanimously quashed the conviction upon the ground that, although the prisoner threw the stone intending to strike some one or more persons, he did not intend to break the window. The courts above have intimated their opinion that if the jury (upon a question to that effect being left to them) had found that the prisoner, knowing the window was there, might have reasonably expected that the result of his act would be the breaking of the window, that then the conviction should be upheld. During the argument of this case the Crown counsel required us to assume that the jury found their verdict upon the ground that in their opinion the prisoner may have expected that the fire would be the consequence of his act in stealing the rum, but nevertheless did the act recklessly, not caring whether the fire took place or not. But at the trial there was not even a suggestion of any such ground, and we cannot assume that the jury formed an opinion which there was no evidence to sustain, and which would be altogether inconsistent with the circumstances under which the fire took place. The reasonable inference from the evidence is that the prisoner lighted the match for the purpose of putting the spile in the hole to stop the further running of the rum, and that while he was attempting to do so the rum came in contact with the lighted match and took fire. The recent case of Regina *v.* Welch (13 Cox C. C. 121), has been also referred to, and has been relied on by the Crown counsel on the ground that, though the jury found that the prisoner did not in fact intend to kill, maim, or wound the mare that had died from the injury inflicted by the prisoner, the prisoner was nevertheless convicted on an indictment charging him with having unlawfully and maliciously killed, maimed, or wounded the mare, and such conviction was upheld by the Court. But on referring to the circumstances of that case it will be seen that the decision in it does not in any way conflict with that in the previous case of Regina *v.* Pembliton, and furnishes no ground for sustaining the present conviction. Mr. Justice Lindley, who tried that subsequent case, appears to have acted in accordance with the opinion expressed by the judges in Regina *v.* Pembliton. Besides leaving to the jury the question of prisoner's intent, he also left them a second question, namely,

whether the prisoner, when he did the act complained of, knew that what he was doing would or might kill, maim, or wound the mare, and nevertheless did the act recklessly, and not caring whether the mare was injured or not. The jury answered that second question in the affirmative. Their finding was clearly warranted by the evidence, and the conviction was properly affirmed. By those two questions a distinction was taken between the case of an act done by a party with the actual intent to cause the injury inflicted, and the case of an act done by a party knowing or believing that it would or might cause such injury, but reckless of the result whether it did or did not. In the case now before us there was no ground whatever for submitting to the jury any question as to the prisoner believing or supposing that the stealing of the rum would be attended with a result so accidental and so dangerous to himself. During the argument doubts were suggested as to the soundness of the decision in Regina *v.* Pembliton; but in my opinion that case was rightly decided and should be followed. Its authority was not questioned in Regina *v.* Welch, in which the judges who constituted the Court were different from those who had decided Regina *v.* Pembliton, with the exception of Lord Coleridge, who delivered the judgments of the Court on both occasions.

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CHAPTER VII.

Coupling of Act and Intent: Act with no sufficient Intent; Intent with no sufficient Act.

Section 1. Act with no sufficient Intent.

COMMONWEALTH *v.* NEWELL,

7 Mass. 245 [1810].

The prisoners were indicted for feloniously and burglariously breaking and entering the dwelling-house of Edward Dixon, of Boston, in the night of the 17th of August last, with the intent unlawfully and feloniously to assault the said Dixon and to cut off one of his ears, with an intention the said Dixon to maim and disfigure; and after being so entered, for unlawfully and feloniously assaulting the said Dixon and cutting off his right ear, with intention him to maim and

disfigure, with set purpose, and of their aforethought malice, against the peace and the form of the statutes in such case provided.

The prisoners demurred to the indictment.

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Parsons, C. J. The objection to the indictment is that the facts therein found do not amount to felony. The breaking and entering of a dwelling-house in the night is not burglary, unless it be done with an intent to commit a felony. This position the attorney-general has not contested. The question for our decision then is, whether the cutting off the ear of Dixon, of set purpose and of malice aforethought, with the intention to maim and disfigure him, is by our laws a felony; for if it be not a felony, an intention to do it cannot be an intention to commit felony.

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By the ancient common law, mayhem was an injury of a particular nature, constituting a specific offence, the commission of which could be regularly averred by no circumlocution without the aid of the barbarous verb *mahemiare*. It consisted in violently and unlawfully depriving another of the use of a member proper for his defence in fighting, and was punished by a forfeiture of member for member, in consequence of which forfeiture it was deemed a felony. If the sufferer sought this satisfaction, or rather revenge, his remedy was by an appeal of mayhem; and the sovereign punished this injury done to his subject by an indictment for a mayhem; and in both the appeal and indictment the offence must be alleged to have been committed feloniously.

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This was the state of the common law, long before and at the time when our ancestors emigrated to this country, bringing with them but a very small part of the common law, defining crimes and their punishment. Mayhem was therefore never deemed by them a felony, but only an aggravated trespass at common law; and as such, the offender was answerable to the party injured in a civil action of trespass and to the government upon an indictment for a misdemeanor; and no statute provision, during the existence of the colonial and provisional charters, recognizes mayhem as a distinct offence from trespass or as constituting a specific felony. We are therefore obliged to consider mayhem as no felony by the common law adopted in this State.

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We are therefore satisfied that the offence described in the indictment is not a felony, either by our common law or by any statute.

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Per Curiam. Let judgment be entered that the indictment is bad, and let the prisoners be discharged.

REX v. KNIGHT,

2 East P. C. 510 [1782].

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The prisoners were indicted for feloniously and burglariously breaking and entering the dwelling-house of Mary Snelling at East Grinstead, in the night of November 14, 1781, with intent to steal the goods of Leonard Hawkins, then and there being in the said dwelling-house. It appeared that L. Hawkins, being an excise officer, had seized seventeen bags of tea on the same month at a Mrs. Tilt's, in a shop entered in the name of Smith, as being there without a legal permit, and had removed the same to Mrs. Snelling's at East Grinstead, where Hawkins lodged. The tea, the witnesses said, they supposed to belong to Smith; and that on the night of November 14 the prisoners and divers other persons broke open the house of Mary Snelling with intent to take this tea. It was not proved that Smith was in company with them; but the witnesses swore that they supposed the fact was committed either in company with or by the procurement of Smith. The jury were directed to find the prisoners guilty, on the point being reserved; and being also directed to find as a fact with what intent the prisoners broke and entered the house. They found that they intended to take the goods on the behalf of Smith. In Easter term following all the judges held that the indictment was not supported, there being no intention to steal, however outrageous the behavior of the prisoners was in thus endeavoring to get back the goods for Smith.

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Section 2. Intent with no sufficient act.

REGINA v. HENNAH.

13 Cox C. C. 547 [1877].

William Hennah was charged under 24 & 25 Vict. c. 180, § 24, with unlawfully and maliciously administering to Mary Ann Rowe "a poison," to wit, "a certain destructive or noxious thing" called cantharides, with intent to injure, aggrieve, or annoy, at Mevagissey, on the 21st October, 1876.

The prisoner was a shoemaker and the prosecutrix the daughter of a blacksmith, living just opposite each other in the same street; and

from the evidence it appeared that the prisoner spoke to her while talking to another young woman at her father's door, and offered her a "broad fig," which she declined, but afterwards accepted, and he gave her two. Walking indoors she put a part of one into her mouth and offered the residue to her father, who observing something "glistening" in it made an observation; upon which she spat out what she had been chewing, and the father took the other fig to a chemist, who found some portion of a Spanish fly had been inserted into it.

The father then went after the prisoner and accused him of applying this trick upon his daughter, saying that it was "enough to poison the whole family."

Prisoner at first denied, but afterwards came to the father's house to apologize and ask him to overlook it, saying that it was not intended for his daughter but another girl named Robins. In answer to counsel, the father said he did not know at the time what the nature or qualities of "Spanish fly" were, but he was suspicious of what appeared to be glistening, and he made subsequent inquiries.

T. C. Browne produced the remaining fig, which was handed to him by the last witness.

Mr. Mitchell, chemist of St. Austell, examined the fig, and found it to contain Spanish fly, weighing from a grain to a grain and a half, a quantity insufficient to produce any effect upon the human system. According to Dr. Taylor and other authorities, cantharides would not produce the effect popularly supposed unless it was given in quantity sufficient to produce death.

In cross-examination witness said there were other flies besides Spanish fly that had the appearance of the one now produced. A fatal dose would amount to about twenty-four grains.

This being the evidence for the prosecution, Carter submitted there was no case to go to the jury. To sustain this indictment it must be shown that there had been a sufficient quantity of the drug administered to cause the effect alleged to be desired, so that, whatever the intent was, it would not in law amount to administering a noxious thing if what was administered could produce no effect. Many substances were noxious or harmless, and depended for their consequences upon the quantity applied.

Cockburn, C. J. What things would you name, Mr. Carter, as coming in that category?

Carter. I think, my Lord, I might mention opium, tobacco, and brandy or alcohol. There are many bon-bons and confectionery, for instance, that contain prussic acid, a deadly poison, yet in such minute quantities as to be innoxious.

Cockburn, C. J. I cannot help thinking that, supposing the thing

was not capable of doing mischief, if it were used for the purpose of doing mischief, then the person administering it must take the consequences. There were three points for consideration. Did the prisoner administer the thing? Was it a noxious thing? Or was it administered, being a noxious thing, with the intent to injure or annoy?

Carter. There must be both the power and intent to injure. There are many matters in law and fact (in questions of assault for instance), that even where the intent was clear, if the power were wanting, it would not amount legally to an assault.

After some further discussion his Lordship retired to consult with the learned judge, Sir H. Hawkins, in the other Court, upon the points raised, and after an absence of half an hour returned.

Cockburn, C. J. My learned brother and I have given this case great attention. We feel it is a question of considerable importance, and we are of opinion that Mr. Carter's point is a good one and that the prisoner must be acquitted. The statute requires, in order to constitute an offence, that there shall have been the administration of a noxious thing, and we think, in order to make out an offence, the thing administered must be of such a character as to satisfy rigorously the requirement of the law, namely, that it must be a noxious thing. I think there must be a distinction between a thing only noxious when given in excess and a thing which is a recognized poison and is known to be a thing noxious and pernicious in effect. . . . Upon the medical evidence before us, cantharides, or, as it is commonly called, Spanish fly, is administered medicinally and in small quantities, and up to a certain extent is incapable of producing any effect. What is important to the present case is that the quantity administered was incapable of producing any effect. The statute makes it an offence to administer, although not with the intention of taking life or of doing any serious bodily harm, any noxious thing with intent to cause injury or annoyance. But unless the thing is a noxious thing in the quantity administered, it seems exceedingly difficult to say logically there has been a noxious thing administered. The thing is not noxious in the form in which it has been taken; it is not noxious in the degree or quantity in which it has been given and taken. We think, therefore, the indictment will not hold. It would be very different if the thing administered, as regards either its character or degree, were capable of doing mischief. But because it happens to fail in a particular instance from any collateral or unforeseen cause, owing may be to the vigor of the constitution of the person to whom it is administered or some cause of that description, if it was capable of doing mischief at all it would be within the statute. But here the quantity was incapable of doing any mischief, and therefore we shall not be justified, although it was

administered with the intent of producing inconvenience or annoyance, in saying that it is within the statute, seeing the thing is not, in the form administered, noxious. Therefore, under those circumstances the case is not made out against the prisoner and you are bound to find him *Not Guilty.*

CHAPTER VIII.

The Mental Element in Crime.

Culpable Inaction; Negligence.

See REGINA *v.* DOWNES,
1 Q. B. D. 28;
REGINA *v.* FRIEND,
Russ. & Ry. 20;
REGINA *v.* NICHOLLS,
13 Cox C. C. 75;
REGINA *v.* FRANKLIN,
15 Cox C. C. 163;
ALL CITED ABOVE.

REGINA *v.* HUGHES,
7 Cox C. C. 301 [1857].

COURT OF CRIMINAL APPEAL.

The following case was reserved by Watson, B.: —

This prisoner was tried before me at the last Swansea Assizes, on February 25, 1857, on an indictment for manslaughter.

It was proved that some contractors were employed to wall the inside of a new shaft which was sinking in a colliery called the Tylecock Colliery. The deceased with others were working at the wall on a stage in the shaft. The prisoner was banksman at the top of the shaft, where there was an engine and rope to send down bricks and materials in a bucket and draw up the empty bucket. It was his duty to send down materials and to superintend the proper letting down the buckets and to place the stage hereinafter mentioned. The buckets were run on a truck on to a movable stage over half the area of the

top of the shaft, and then the bucket was attached and lowered down, the stage being withdrawn.

The prisoner on the occasion in question had omitted to put or to cause to be put the stage on the mouth of the shaft. In the absence of the stage, a bucket with a truck and bricks ran along the tramroad into the shaft and fell down the pit and killed the deceased. It did not appear that the prisoner was directing or driving the wagon at the time.

I left it to the jury whether the accident happened by negligence of the prisoner, and whether that negligence arose from an act of omission or commission. They found that the death of deceased arose from negligent omission on the part of the prisoner in not putting the stage on the mouth of the shaft. Thereupon I directed a verdict of guilty. I did not pass sentence. I released the prisoner on bail until the opinion of the Criminal Court of Appeal should be taken.

This case was not argued by counsel, but it was considered by the judges above named.

LORD CAMPBELL, C. J., now delivered the judgment of the Court. We are of opinion that this conviction ought to be affirmed. It was the duty of the prisoner to place the stage on the mouth of the shaft; the death of the deceased was the direct consequence of the omission of the prisoner to perform this duty. If the prisoner, of malice aforethought and with the premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. According to the common-law form of an indictment for murder, by reason of the omission of a duty, it was necessary that the indictment should allege that it was the duty of the prisoner to do the act, or to state facts from which the law would infer this duty. R. *v.* Edwards, 8 Car. & P. 611; R. *v.* Sarah Goodwin, 1 Russ. on Crimes, 563 n., 3d ed. But it has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child) this is a case of murder. If the omission was not malicious and arose from negligence only, it is a case of manslaughter. It has been held that to make the captain of a vessel guilty of manslaughter in causing a person to be drowned by running down a boat, proof of a mere omission on his part to do the whole of his duty is not sufficient. R. *v.* Allen, 7 Car. & P. 153. But there is no authority for the position that without an act of commission there can be no manslaughter; and on the contrary, the general doctrine seems well established that what constitutes murder being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence. *Conviction affirmed.*

REGINA *v.* SMITH,

11 Cox C. C. 210 [1869].

THOMAS SMITH was indicted for the manslaughter of Richard Gibson, at Dearham, on the 8th of February, 1869, under the following circumstances: —

The prisoner was employed by a Mr. Harrison, an extensive colliery proprietor near Dearham, and who was also the owner of a tramway which crossed the Maryport and Carlisle turnpike road. It was the prisoner's duty to give warning to any persons when any trucks might cross the said road. The tramway was in existence before the road, and in the act by which the road was made there was no clause imposing on Mr. Harrison the duty of placing a watchman where the tramway crossed the road. On the 8th of February, 1869, the deceased was crossing the tramway, having received no warning that any trucks were about to cross the road. As he was crossing, however, he was knocked down by some trucks and was killed. On inquiry it appeared that the prisoner was absent from his post at that time, although he had strict orders never to be absent.

Campbell Foster, for the prisoner, contended that, it being an act of omission, such omission ought to have been stated in the indictment.

The learned judge held that under the words "did feloniously kill and slay" it was unnecessary to state in the indictment that it was an act of omission on the part of the prisoner which caused the death of the deceased.

Campbell Foster then contended that the facts of the case disclosed no duty between the prisoner and the public.

In this the learned judge concurred, saying that, there being no clause in the act compelling Mr. Harrison to place a watchman where the tramway crossed the road, the prisoner was merely the private servant of Mr. Harrison; and that consequently his negligence did not constitute such a breach of duty as to make him guilty of manslaughter. *Prisoner discharged.*

CHAPTER IX.

The Mental Element in Crime.

Intent without Possibility of Success.

COMMONWEALTH *v.* GREEN,

2 Pick. 380 [1824].

At May term, 1823, in the County of Hampden, the prisoner, an infant under the age of fourteen years, was convicted of an assault with intent to commit a rape.

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By the Court, Parker, C. J., dissenting. The Court are of opinion that the verdict must stand and judgment be rendered on it. The law which regards infants under fourteen as incapable of committing rape was established *in favorem vitæ*, and ought not to be applied by analogy to an inferior offence, the commission of which is not punished with death. A minor of fourteen years of age, or just under, is capable of that kind of force which constitutes an essential ingredient in the crime of rape, and he may make an assault with an intent to commit that crime, although by an artificial rule he is not punishable for the crime itself. An intention to do an act does not necessarily imply an ability to do it; as a man who is emasculated may use force with intent to ravish, although possibly, if a certain effect should be now as it was formerly held essential to the crime, he could not be convicted of a rape. Females might be in as much danger from precocious boys as from men, if such boys are to escape with impunity from felonious assaults, as well as from the felony itself.[1] *Motion overruled.*

[1] [See Commonwealth *v.* MacDonald, 5 Cush. 365; Regina *v.* Collins, 9 Cox C. C. 497; Regina *v.* Gamble, 10 Cox C. C. 545; Regina *v.* Brown, 38 W. R. 95; State *v.* Wilson, 30 Conn. 505.]

CHAPTER X.

The Mental Element in Crime.

Malice.

COMMONWEALTH *v.* WALDEN,

3 Cush. 558 [1849].

The defendant was indicted in the Court of Common Pleas, and there tried before Byington, J., for malicious mischief, in contravention of that part of the 39th section of the 126th chapter of the Revised Statutes, which prohibits the wilfully and maliciously destroying or injuring the personal property of another in any manner or by any means not particularly described or mentioned in that chapter.

The indictment alleged that the defendant "a certain mare of the value of fifty dollars, of the goods, chattels, and personal property of one Robert Noble, did then and there wilfully and maliciously injure, by then and there wilfully and maliciously shooting and discharging a certain gun, which he, the said Robert Walden, then and there had and held, and which gun was then and there loaded with powder and leaden shot, at and against the said mare, whereby the said mare was severely wounded in the side, hip, and shoulder of the said mare, and thereby was greatly injured and rendered of little value."

The jury were instructed on the trial that the word "maliciously," in that part of the 39th section of the Rev. Sts. c. 126, upon which the indictment was framed, meant "the wilfully doing of any act prohibited by law and for which the defendant had no lawful excuse, and that moral turpitude of mind was not necessary to be shown."

The defendant, being convicted, alleged exceptions to these instructions.

Wilde, J. This is an indictment for malicious mischief wherein the defendant is charged with the wilful and malicious shooting and severely injuring the mare of one Robert Noble contrary to the Rev. Sts. c. 126, § 39. The evidence is not reported; but whatever it was the Court, in the instruction to the jury, defined the word "maliciously" in said section to mean "the wilfully doing of any act prohibited by law, and for which the defendant had no lawful excuse; and that moral turpitude of mind was not necessary to be shown." If this definition of the crime charged were correct it would follow that the words "wilfully and maliciously" were intended by the legislature to be under-

stood as synonymous, and that the statute is to be construed in the same manner as it would be if the word "maliciously" had been omitted. Such a construction we are of opinion cannot be sustained, for if it could be it would follow that a person would be liable to be punished criminally and with great severity for every wilful trespass, however trifling the injury might be to the personal property of another, which could not be justified or excused in a civil action against him for the recovery of damages by the owner. We do not suppose the learned judge intended to be so understood by the jury, but they might so understand him. As to that part of the instruction that moral turpitude of mind was not necessary to be shown, whether correctly stated or not, we do not think it material to consider. The question is not whether the jury were rightly instructed as to what facts would not constitute malice, but as to what facts would constitute malice or be presumptive and conclusive proof of it. The learned judge was probably of opinion that if the mare was injured, as alleged, by the discharge of a gun loaded with powder and shot, that *ipso facto* would be conclusive proof of malice. But that question we think should have been submitted to the jury. The gun might have been loaded for the purpose of shooting small birds with a very light charge of powder and very fine shot which would not be likely to kill or do great bodily harm; and we do not know that any great bodily harm was done. The only facts established by the verdict are that the mare was injured by the defendant by the discharge of a gun loaded with powder and shot, and that the act was done wilfully; but an act may be unlawful and may be done wilfully, with or without malice, according to the evidence of the motive and of the circumstances attending the transaction. The evidence, therefore, should have been submitted to the jury with instructions that they would not be warranted in finding a verdict of guilty unless the injury charged in the indictment was done by the defendant not only wilfully but also maliciously; that if the injury was done intentionally and by design, and not by mistake, accident, or inadvertence, that would fully support the allegation in the indictment that it was done wilfully according to the true meaning of the statute. But the jury might infer malice from the fact that the injury was done by the discharge of a gun loaded with powder and shot, unless the inference were rebutted by the evidence, showing that the gun was so loaded that it was not likely to kill or do any great bodily harm; and the jury should have been so instructed. The jury should also have been instructed that to authorize them to find the defendant guilty they must be satisfied that the injury was done either out of a spirit of wanton cruelty or wicked revenge. Malicious mischief amounting to a crime is so defined by Blackstone, 4 Bl. Com. 244, and in Jacob's Law

Dictionary, by Tomlin, under the title "Mischief, Malicious;" and we have no doubt that such is the true definition of the crime.

Exceptions sustained and new trial granted.

REGINA *v.* FAULKNER,

13 Cox C. C. 550, ABOVE.

REGINA *v.* PEMBLITON,

12 Cox C. C. 607 [1874].

COURT OF CRIMINAL APPEAL.

CASE stated for the opinion of this court by the Recorder of Wolverhampton.

At the Quarter Sessions of the Peace held at Wolverhampton on the 8th day of January instant, Henry Pembliton was indicted for that he "unlawfully and maliciously did commit damage, injury, and spoil upon a window in the house of Henry Kirkham," contrary to the provision of the St. 24 & 25 Vict. c. 97, § 51. This section of the statute enacts: —

"Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or a private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding £5, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable," etc. . . .

On the night of the 6th day of December, 1873, the prisoner was drinking with others at a public-house called "The Grand Turk," kept by the prosecutor. About 11 o'clock P. M., the whole party were turned out of the house for being disorderly, and they then began to fight in the street and near the prosecutor's window, where a crowd of from forty to fifty persons collected. The prisoner, after fighting some time with persons in the crowd, separated himself from them and removed to the other side of the street, where he picked up a large stone and threw it at the persons he had been fighting with. The stone passed over the heads of those persons and struck a large plate-glass window in the prosecutor's house and broke it, thereby doing damage to the extent of £7 12*s.* 9*d.*

The jury, after hearing evidence on both sides, found that the prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window, and they returned

a verdict of "guilty;" whereupon I respited the sentence, and admitted the prisoner to bail, and pray the judgment of the Court for Crown Cases Reserved, whether upon the facts stated and the finding of the jury, the prisoner was rightly convicted or not.

(Signed) JOHN J. POWELL,
Recorder of Wolverhampton.

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LORD COLERIDGE, C. J. I am of opinion that this conviction must be quashed. The facts of the case are these. The prisoner and some other persons who had been drinking in a public-house were turned out of it at about 11 P. M. for being disorderly, and they then began to fight in the street near the prosecutor's window. The prisoner separated himself from the others and went to the other side of the street, and picked up a stone and threw it at the persons he had been fighting with. The stone passed over their heads and broke a large plate-glass window in the prosecutor's house, doing damage to an amount exceeding £5. The jury found that the prisoner threw the stone at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window. The question is whether under an indictment for unlawfully and maliciously committing an injury to the window in the house of the prosecutor, the proof of these facts alone coupled with the finding of the jury will do? Now I think that is not enough. The indictment is framed under the 24 & 25 Vict. c. 97, § 51. The Act is an Act relating to malicious injuries to property, and § 51 enacts that whosoever shall unlawfully and maliciously commit any damage, etc., to or upon any real or personal property whatsoever of a public or private nature, for which no punishment is hereinbefore provided, to an amount exceeding £5, shall be guilty of a misdemeanor. There is also the 58th section which deserves attention. "Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise." It seems to me on both these sections, that what was intended to be provided against by the Act is the wilfully doing an unlawful act, and that the act must be wilfully and intentionally done on the part of the person doing it, to render him liable to be convicted. Without saying that, upon these facts, if the jury had found that the prisoner had been guilty of throwing the stone recklessly, knowing that there was a window near which it might probably hit, I should have been disposed to interfere with the conviction, yet as they have found that he threw the stone at the people he had been fighting with, intending to

strike them and not intending to break the window, I think the conviction must be quashed. I do not intend to throw any doubt on the cases which have been cited, and which show what is sufficient to constitute malice in the case of murder. They rest upon the principles of the common law and have no application to a statutory offence created by an Act in which the words are carefully studied.

BLACKBURN, J. I am of the same opinion, and I quite agree that it is not necessary to consider what constitutes wilful malice aforethought to bring a case within the common-law crime of murder, when we are construing this statute, which says that whosoever shall unlawfully and maliciously commit any damage to or upon any real or personal property to an amount exceeding £5 shall be guilty of a misdemeanor. A person may be said to act maliciously when he wilfully does an unlawful act without lawful excuse. The question here is, Can the prisoner be said, when he not only threw the stone unlawfully but broke the window unintentionally, to have unlawfully and maliciously broken the window? I think that there was evidence on which the jury might have found that he unlawfully and maliciously broke the window, if they had found that the prisoner was aware that the natural and probable consequence of his throwing the stone was that it might break the glass window, on the principle that a man must be taken to intend what is the natural and probable consequence of his acts. But the jury have not found that the prisoner threw the stone, knowing that on the other side of the men he was throwing at there was a glass window, and that he was reckless as to whether he did or did not break the window. On the contrary, they have found that he did not intend to break the window. I think therefore that the conviction must be quashed.

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Conviction quashed.

REGINA *v.* LATIMER,

17 Q. B. D. 359; 16 Cox C. C. 70 [1886].

COURT OF CRIMINAL APPEAL.

CASE stated by the learned Recorder for the borough of Devonport as follows: —

The prisoner was tried at the April Quarter Sessions for the borough of Devonport on the tenth day of April, 1886.

The prisoner was indicted for unlawfully and maliciously wounding Ellen Rolston. There was a second count charging him with a common assault.

The evidence showed that the prosecutrix, Ellen Rolston, kept a public-house in Devonport; that on Sunday, the 14th day of February, 1886, the prisoner, who was a soldier, and a man named Horace Chapple were in the public-house, and a quarrel took place, and eventually the prisoner was knocked down by the man Horace Chapple. The prisoner subsequently went out into a yard at the back of the house. In about five minutes the prisoner came back hastily through the room in which Chapple was still sitting, having in his hand his belt, which he had taken off. As the prisoner passed, he aimed a blow with his belt at the said Horace Chapple and struck him slightly. The belt bounded off and struck the prosecutrix, who was standing talking to the said Horace Chapple, in the face, cutting her face open and wounding her severely.

At the close of the case the learned Recorder left these questions to the jury: 1. Was the blow struck at Chapple in self-defence to get through the room, or unlawfully and maliciously? 2. Did the blow so struck in fact wound Ellen Rolston? 3. Was the striking Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple?

The jury found: 1. That the blow was unlawful and malicious. 2. That the blow did in fact wound Ellen Rolston. 3. That the striking Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected.

Upon these findings the learned Recorder directed a verdict of guilty to be entered to the first count, but respited judgment and admitted the prisoner to bail, to come up for judgment at the next Sessions.

The question for the consideration of the Court was, whether upon the facts and the findings of the jury the prisoner was rightly convicted of the offence for which he was indicted.

By § 20 of 24 & 25 Vict. c. 100, it is enacted that, —

"Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of misdemeanor."

. . . . . .

Lord Coleridge, C. J. I am of opinion that this conviction must be sustained. In the first place, it is common knowledge, that if a person has a malicious intent toward one person and in carrying into effect that malicious intent he injures another man, he is guilty of what the law considers malice against the person so injured, because he is guilty of general malice; and is guilty if the result of his unlawful act

be to injure a particular person. That would be the law if the case were *res integra;* but it is not *res integra*, because, in Regina *v.* Hunt, a man, in attempting to injure A., stabbed the wrong man. There, in point of fact, he had no more intention of injuring B. than a man has an intent to injure a particular person who fires down a street where a number of persons are collected, and injures a person he never heard of before. But he had an intent to do an unlawful act, and in carrying out that intent he did injure a person; and the law says that under such circumstances a man is guilty of maliciously wounding the person actually wounded. That would be the ordinary state of the law if it had not been for the case of Regina *v.* Pembliton. But I observe that, in such an indictment as in that case, the words of the statute carry the case against the prisoner more clearly still, because by § 18 of the statute 24 & 25 Vict. c. 100, it is enacted that "whosoever shall unlawfully and maliciously by any means whatsoever wound . . . any person . . . with intent to maim, disfigure, or disable any person . . . shall be guilty of felony;" and then § 20 enacts that "whosoever shall unlawfully and maliciously wound . . . any other person . . . shall be guilty of a misdemeanor," and be liable to certain punishments. Therefore the language of the 18th and 20th sections are perfectly different; and it must be remembered that this is a conviction for an offence under the 20th section. Now the Master of the Rolls has pointed out that these very sections are in substitution for and correction of the earlier statute of 9 Geo. IV., c. 31, where it was necessary that the act should have been done with intent to maim, disfigure, or disable such person, showing that the intent must have been to injure the person actually injured. Those words are left out in the later statute, and the words are "wound any other person." I cannot see that there could be any question but for the case of Regina *v.* Pembliton. Now, I think that that case was properly decided, but upon a ground which renders it clearly distinguishable from the present case. That is to say, the statute which was under discussion in Regina *v.* Pembliton makes an unlawful injury to property punishable in a certain way. In that case, the jury and the facts expressly negatived that there was any intent to injure any property at all; and the Court held that, in a statute which created it an offence to injure property, there must be an intention to injure property in order to support an indictment under that statute. But for that case Mr. Croft is out of court, and I therefore think that this conviction should be sustained.

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CHAPTER XI.

Locality in Crime.

Constructive Presence through Innocent Instrumentality; Constructive Presence through Guilty Instrumentality.

Section 1. Innocent Instrumentality.

REGINA v. TAYLOR,

4 F. & F. 511 [1865].

The prisoner was indicted in one set of counts for that he feloniously forged a check or order for the payment of money, and in other counts for that he feloniously uttered the same, knowing the same to be forged.

The check was dated at Dieppe, 26th of May, 1865, and it purported to be drawn by one Johnson on the London and County Bank, of which there was a branch at Gravesend, where one Johnson had an account.

The prisoner was in his employ and was aware of the fact that he had an account there.

On the 27th May, 1865, the check for £25 was presented at the office of Messrs. Arthur & Co., bullion dealers and money changers, at the Rue de Rivoli, France, with a letter purporting to be from Johnson and representing that the check should be cashed for him, and a card having on it the address of Johnson at "Hotel de Newhaven, Dieppe;" and a similar address was afterwards found upon the prisoner. They refused to change the check, but retained it for collection and sent it to their London agent, who presented it for payment, and it was honored. On receiving advice of this, Arthur & Co. sent the money in a registered letter to the address they had received, namely, to Mr. Johnson, Hotel de Newhaven, Dieppe; but the letter was returned through the post, no such person being known. It was proved that the prisoner was in France at the time the address was found in his pocket. Johnson was called to prove that neither check, letter, nor address were in his writing, and he proved that the letter was in the prisoner's writing and spoke to his belief, upon comparison with the other documents, that they were all in the prisoner's handwriting.

It appeared at the time the check was presented in Paris no stamp

was upon it; but an adhesive or third foreign postage bill-stamp was put upon it by Messrs. Arthur.

At the conclusion of the case for the prosecution Addison took several objections: First, that there was no evidence of any offence within the jurisdiction of this country. The forgery, if any, was in France; and as to the uttering there was no evidence that the prisoner was the person who presented the check in Paris and thereby set agents in motion, who presented the check in England. Secondly, that it was not a check; it had no stamp upon it when presented in Paris. Thirdly, there was no sufficient evidence of any forgery at all, and it never was the intention of the legislature in the recent Act to allow a forgery to be proved by mere comparison of handwriting.

. . . . . .

The learned judge thought it was a case for the jury. As to the forgery, that appeared to have been committed in France; but there was evidence to go to the jury of uttering. If a person in a foreign country set other persons in motion as his agents, by whom the check was presented at the bank in England, that was an uttering of which he might be convicted here. Further, he thought the instrument might be an order for the payment of money without having a stamp upon it.

In summing up the case the learned judge said it was urged that the forgery was not in France, but there was no evidence where it was forged; and there was also a charge of uttering the instrument knowing it to be forged, and the uttering might be in this country even although the forgery was abroad; and it might be by the hand of another person by the direction of the prisoner. The check was dated at Dieppe, but it might not have been drawn there, and if it had, it was parted with at Gravesend; and if this was by the direction of the prisoner and with a knowledge of the forgery upon his part, that would suffice to sustain the charge. The real question came to this, whether he had put the matter in motion, whether he had issued the check and caused it in this country to be circulated.

Of this, his having forged it would be evidence; and the forgery, though abroad, might, with other evidence, be evidence of an uttering in this country. On the other hand, though the forgery was not proved, the other circumstances in the case might be sufficient to show the uttering. There was the circumstance of the address of Johnson being found in the prisoner's pocket and of his having been in France at the time. It was true that the forgery itself was proved by comparison of handwriting; but the great question was as to the uttering. And if the jury were satisfied that the prisoner presented the check in France and caused it to be presented here, they should find him guilty. *Verdict, not guilty.*

REGINA *v.* FINKELSTEIN, ET AL.,

16 Cox C. C. 107 [1886].

THE prisoners were tried before the Common Sergeant on the 12th day of March, 1886, upon an indictment which charged them with having forged and uttered one hundred Ville de Paris bonds of 1871 with intent to defraud; and the following facts were proved: —

At the latter end of 1885 a limited company in Brussels engaged in advancing money and selling bonds, called the Caisse Général de Reports et de Depôts, had business transactions with a firm in London called Coulon Noel & Co., and sold for them a number of bonds, including Ville de Paris bonds. On the fourth day of January they received from Coulon Noel & Co. a letter (*produced*) containing one hundred Ville de Paris bonds of 1871 for negotiation, for which on the 5th day of January they sent to Coulon Noel & Co. a check for £1500. The bonds were subsequently discovered to be forgeries.

In the month of February, 1885, an office at 66 Holborn Viaduct was let to some persons calling themselves Coulon Noel & Co., the negotiations for the letting being made with the prisoner Truscovitch and a person named Noel, whose clerk Truscovitch was represented to be. Truscovitch was known at the office as the clerk, under the name of Oldson, and Noel and he were the only persons seen at the office. In May, 1885, a drawing account was opened at the City Bank by Noel in the name of Coulon Noel & Co., Coulon Noel being the sole partner who had the right to draw upon the account. On the 6th day of January, 1886, a check for £1500 drawn by the Caisse Général de Reports et de Depôts, dated the 5th day of January, was paid into such account, bearing the indorsement Coulon Noel & Co., and was presented by the City Bank through the Clearing House. On the 7th day of January two checks drawn by Coulon Noel & Co. for £816 and £679 were presented at the City Bank by Truscovitch, who received Bank of England notes in payment, which notes he exchanged for other notes and gold at the Bank of England the same day. Some of the notes so obtained were afterwards exchanged by Truscovitch at different money-changers for foreign notes and money; and on the 12th day of January the prisoner Finkelstein endeavored to telegraph some money to Stockholm, but was too late to do so that day, and he therefore sent the following telegram under the name of Litvinoff to one Reicher at Stockholm, "Too late; will send together to-morrow."

At the end of 1885 an office in Aldersgate Street had been let to a

man named Dubois, to whom Truscovitch had been seen to come. Neither of the prisoners was Dubois. On a piece of blotting-paper left at the office in Aldersgate Street could be discerned the name "Coulon Noel & Co." several times, the name "Oscar Haldy" once, and the names of several foreign banks. Both the prisoners had lodged together, and Finkelstein had been known as Litvinoff as well as Finkelstein, while Truscovitch at one time had passed under the name of Oscar Haldy.

The prisoner Finkelstein was arrested in London, but Truscovitch was received into custody from the Swedish police at Stockholm, where he was in prison, having been arrested under the name of Dubois, under which name he was extradited.

. . . . . .

Besley, on behalf of Finkelstein, thereupon submitted that there was no evidence of any uttering of forged bonds in this country, and no evidence that Finkelstein had been an accessory to the uttering.

Avory contended that there was sufficient evidence of posting the bonds in this country to support the count for uttering, and cited Rex *v.* Burdett (4 B. & Ald. 95) and Rex *v.* Giles (1 Moody C. C. 166; Car. C. L. 191). In the former case it was held that where it was proved that the defendant wrote a libel in L. on a particular day and that the libel was delivered in an open envelope by A. to B. in M. on the following day, that there was evidence upon which a jury might properly be left to presume that the libel was delivered open by the defendant to A. in L.; and in the latter case it was held that the giving a forged note to an innocent agent or an accomplice that he may pass it is a disposing of or putting it away. That there was therefore evidence to go to the jury in the present case as to both the prisoners.

The Common Sergeant after consulting Stephen, J., was of opinion that it was for the jury to say whether they considered there was sufficient evidence of the posting of the letter containing the bonds; and that if they came to the conclusion that there was not sufficient, he ought to direct a verdict of not guilty; but that, should the jury think that there was sufficient evidence, the court had jurisdiction, and the case ought to proceed.

In the result each of the prisoners was found guilty of uttering the bonds.

COMMONWEALTH *v.* TAYLOR,

105 Mass. 172 [1870].

Indictment on the Gen. Sts. c. 161, § 54, for obtaining two mowing machines at Millbury in this county, by false pretences.

At the trial in the Superior Court, Dewey, J., refused a request of the defendant for a ruling that the evidence would not sustain the indictment. The jury found the defendant guilty, and he alleged exceptions. The case is stated in the opinion.

Chapman, C. J. The defendant contends that the evidence in the case is not sufficient in law to prove that the offence was completed in the county of Worcester. He admits that the false pretences were made there, but contends that the goods were not obtained there.

On that point the evidence tended to prove that he there represented to the owners of the machines that he was authorized by several persons, named by him, to give orders in their behalf for the purchase of the machines, to be sent to them severally by railroad at different places in Vermont. The machines were sent accordingly; but there were no such persons, and he received the goods himself, as he had intended to do.

If there had been such persons as he named, and the machines had been sent to them, there might have been good reason to hold that the goods were not delivered to him in this county. But as in fact these names, being fictitious, represented only himself, and as the goods were really sent to him and received by him, he was the real consignee. The well established doctrine, that delivery to the carrier is a delivery to the consignee, must apply to this case, and thus the offence was completed in this county. *Exceptions overruled.*

Section 2. Guilty Instrumentality; Statutory Constructive Presence of Accessory.

COMMONWEALTH *v.* PETTES,

114 Mass. 307 [1873].

Indictment against the defendant for being, March 17, 1871, at Boston, in the county of Suffolk, an accessory before the fact to the uttering by one Holden of the following forged certificate of deposit: "Taunton, Mass., March 18th, 1871. Mrs. Martha Woodford has deposited in the Merchants' National Bank of Taunton, Mass., ten

thousand one hundred and fifty-two dollars to the credit of M. Bolles & Co., payable on return of this certificate properly indorsed. B. C. Vickery, Cashier."

At the trial in the Superior Court, before Bacon, J., it appeared that the forged certificate was uttered by Holden to Bolles & Co., at Boston, March 18, 1871. The evidence against the defendant was that he wrote [certain] letters.

. . . . . .

It did not appear that the defendant had prior to the uttering been in Boston. . . . And there was no evidence to show that the letters were written in the county of Suffolk. The letter dated March 14 was sent from Taunton by mail to Bolles & Co. in Boston. The others were delivered to them by Holden.

The defendant asked the Court to instruct the jury "that inasmuch as the accessory acts were alleged as having been committed at Boston, the jury must find, in order to convict the defendant, that such acts, or some of them, were committed within the county of Suffolk." The Court refused so to rule, and instructed the jury "that the writing of the letters in question beforehand would constitute accessory acts, no matter where written, if written for the purpose of aiding in passing the forged check; and that if the effect of the accessory acts reached Boston, where the forged check was passed, then the allegation that such acts were committed at Boston was sustained by proof of their commission anywhere in the world, whether without or within the county of Suffolk."

. . . . . .

GRAY, C. J. The acts relied on to charge the defendant as accessory before the fact, consisting of letters written elsewhere for the purpose of assisting in passing the forged check, but received in the county of Suffolk and having effect there, those acts were in intendment of law committed in the county of Suffolk, and might be so alleged in the indictment. Gen. Sts. c. 168, §§ 4, 5.[1] . . . Commonwealth *v.* Smith, 11 Allen, 243. . . . The instructions on this point were apt and sufficient.

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[1] Gen. Sts. c. 168, § 4. [An accessory] may be indicted, tried, and punished in the same court and county where the principal felon might be indicted and tried, although the offence of counselling, hiring, or procuring the commission of such felony is committed on the high seas or on land either within or without the limits of this State.

CHAPTER XII.

Parties to Criminal Acts.

Principal and Innocent Agent; Joint Principals Acting Separately; Principals in First and in Second Degree; Principal and Accessory.

Section 1. Innocent Agency.

REGINA *v.* TAYLOR,

REGINA *v.* FINKELSTEIN,

COMMONWEALTH *v.* TAYLOR,

cited above.

REGINA *v.* BANNEN,

2 Moody C. C. 309 [1844].

The prisoner was tried before Mr. Baron Gurney, at the Spring Assizes for the county of Warwick, 1844, on an indictment for feloniously making a die, which would impress the figure, stamp, and apparent resemblance of the obverse side of a shilling.

Second count, for feloniously beginning to make such a die.

Third count, for feloniously making a die which was intended to impress the figure, stamp, and apparent resemblance of the obverse side of a shilling.

It was proved by Charles Frederick Carter, a die-sinker at Birmingham, that the prisoner applied to him to sink two dies for counters for two whist clubs, one at Exeter and the other at Blandford, stating that it was their practice to play with counters with one side resembling coins, and that they wished to have counters stamped by dies, to be made in pursuance of the following directions;—

Four dies for whist counters, obverse, head of Queen Victoria, as in the shilling coin; reverse, Blandford whist club, established 1800. Obverse, one shilling, as in coin, with wreath, etc.; reverse, Exeter whist club, established in 1800. The obverse to be as much a *fac simile* as can be; the letters on the reverse to vary in size; all the dies to be the same size, and fit either collar.

When Mr. Carter considered these directions, it occurred to him that there was something very suspicious in them, and he applied to

the agent of the Mint at Birmingham, and communicated the order to him. The agent sent to the officers of the Mint in London for instructions, and Mr. Carter was by them directed to execute the prisoner's order. He proceeded; a long correspondence took place on account of the work not being executed within the time expected. In the course of the correspondence, the prisoner desired to have the obverse of one of the pieces and the obverse of the other finished first, and they were so. When they were finished, they formed a die for the coining of a shilling, and an impression made by the dies was produced in court.

Mr. Serjt. Adams, for the prisoner, objected that the prisoner could not be convicted, as he had not himself done anything in the construction of the die, and that he was not answerable in this form of charge for the act of Carter; that Carter having acted under the instructions of the Mint, no felony whatever had been committed; and that the prisoner should have been indicted for a misdemeanor, in inciting Carter to commit a felony.

The learned judge reserved the point for the opinion of the judges. The jury found the prisoner guilty.

This case was argued in Easter term, 1844, before all the judges except COLERIDGE, J., and MAULE, J.

The prisoner did not commit the offence as charged in the indictment. The statute 2 W. IV., c. 34, § 10, enacts, that "if any person shall knowingly and without lawful authority (the proof of which authority shall lie on the party accused) make, &c., or begin to make, any puncheon, &c., die, &c., such person shall be guilty of felony." Here no person has without lawful authority made or begun to make a die. The only person who has in fact made or begun to make a die is Carter. Before Carter begins, he applies to the Mint. He must be taken to have known the law, and applies to get their authority to proceed. The officers of the Mint gave him orders to proceed; he therefore had lawful authority. If they had power to give the authority, then there was no offence. If they had not, then Carter is guilty of the felony as a principal, and the prisoner ought to have been indicted as an accessory before the fact. If Carter was innocent, the prisoner could not be an accessory, nor could he be a principal: he is not present; and if another does the act for him in his absence, that person must be altogether innocent: to be innocent he must be ignorant of any wrong in what he is doing. Suppose a person knowingly employs an ignorant agent to deliver a forged note: the delivery is his, because the agent is ignorant; so if a person employs an ignorant agent to administer poison, that person may be said himself to administer. Carter here cannot be said to be ignorant. He knows the use to which

the dies are applicable and the guilty purpose for which they were intended by the prisoner. The dies are also made with the knowledge of the Mint. For these reasons Carter cannot be said to be a mere ignorant agent of the prisoner, and therefore the prisoner cannot be a principal felon.

There is no doubt that, if Carter was guilty of felony, this indictment fails. But it is impossible to contend that on these facts Carter was a felon. Perhaps, strictly speaking, no one could have lawful authority to make coining instruments; certainly not, if Carter had not.

TINDAL, C. J. The "having lawful authority" applies to the officers and servants of the Mint.

It is agreed that in one sense he did the act knowingly; but mere knowledge is not enough. The statute means *guilty* knowledge; and that is the distinction clearly pointed out in Foster's "Discourse on Accomplices," p. 349, etc. To be a felon there must be a guilty knowledge. The cases of the child or madman are well established. Now Carter certainly knew what he was doing but had no intention of any felony or furthering a felony; and the authority and knowledge of the Mint would be clearly sufficient to make his knowledge innocent.

In Rex *v.* Palmer and Hudson, Russ. & Ry. 72, which is reported with the judgment delivered by ROOKE, J., 1 New Rep. 97, this distinction is carried out, and the case put of an uttering a forged note by means of an agent ignorant of the forgery is stated to be law. This has since been held to be law in Rex *v.* Giles, Moody, C. C. R. 166. The agent must be an innocent agent. The cases all turn on the distinction of innocent knowledge or guilty knowledge. Carter was clearly an innocent agent, and the prisoner was therefore the principal.

Here Carter, the agent, in fact does nothing at all until he has the orders of the Mint. He is throughout the agent of the Mint, not of the prisoner.

All the judges present, except CRESSWELL, J., thought Carter an innocent agent, and held the conviction good.

REGINA *v.* MICHAEL,

1 MOODY C. C. 120 [1840].

THE prisoner Catherine Michael was tried before Mr. Baron Alderson at the Central Criminal Court in April, 1840 (Mr. Justice Littledale being present), for the wilful murder of George Michael, an infant of the age of nine months, by administering poison.

. . . . . .

It appeared in evidence that the prisoner on the 27th day of March last delivered to one Sarah Stephens, with whom the child was at nurse, a quantity of laudanum about an ounce, telling the said Sarah Stephens that it was proper medicine for the child to take and directing her to administer to the child every night a teaspoonful thereof; that such a quantity as a teaspoonful was quite sufficient to kill a child; and that the prisoner's intention, as shown by the finding of the jury in so delivering the laudanum and giving such directions as aforesaid, was to kill the child.

That Sarah Stephens took home with her the laudanum, and thinking the child did not require medicine had no intention of administering it. She however, not intending to give it at all, left it on the mantelpiece of her room, which was in a different house from where the prisoner resided, she, the prisoner, then being a wet nurse to a lady; and some days afterwards, that is, on the 31st of March, a little boy of the said Sarah Stephens, of the age of five years, during the accidental absence of Sarah Stephens, who had gone from home for some hours, removed the laudanum from its place and administered to the prisoner's child a much larger dose of it than a teaspoonful, and the child died in consequence.

The jury were directed that if the prisoner delivered to Sarah Stephens the laudanum, with intent that she should administer it to the child and thereby produce its death, the quantity so directed to be administered being sufficient to cause death; and that if (the prisoner's original intention still continuing) the laudanum was afterwards administered by an unconscious agent, the death of the child under such circumstances was murder on the part of the prisoner.

They were directed that if the teaspoonful of laudanum was sufficient to produce death, the administration by the little boy of a much larger quantity would make no difference.

The jury found the prisoner guilty. The judgment was respited, that the opinion of the judges might be taken whether the facts above stated constituted an administering of the poison by the prisoner to the deceased child.

This case was considered by all the judges (except GURNEY, B., and MAULE, J.), in Easter term, 1840, and they were unanimously of opinion that the conviction was right.

Section 2. Joint Principals acting separately.

REX v. KIRKWOOD et al.

1 Moody C. C. 304 [1831].

The prisoners, Kirkwood, Collyer, and Calvert were tried before Mr. Justice Littledale, at the Spring Assizes for the county palatine of Lancaster, in the year 1831.

Jonathan Dade, who was in the same indictment, made his escape from the castle at Lancaster during the Assizes before that trial came on.

The first count of the indictment was against J. Dade (otherwise called Jonathan Day) and Robert Kirkwood, for forging a bill of exchange, . . . and against Collyer and Calvert for aiding, abetting, counselling, and procuring said Dade and Kirkwood to commit said felony and forgery.

. . . . . .

Seventh [count] against Dade and Kirkwood for forging an acceptance to said bill, . . . and against Collyer and Calvert for aiding, etc., said Dade and Kirkwood to commit said felony. . . . Ninth count against Dade and Kirkwood for forging [an] indorsement of said bill.

. . . . . .

In the course of the then last year, a person of the name of Wilson, who was examined as a witness for the Crown, concocted a plan with Collyer and Calvert to raise money by means of forged bills of exchange, and Dade became a party to this plan. It was determined among them that Heywood's bank at Manchester was to be the bank whose bills were to be forged, and they caused a real bill to be procured from Heywood's bank.

It was finally agreed that Dade should fill up the bills, and when the agreement was made with Dade, Kirkwood was present; but it did not appear that Kirkwood knew anything of what had been previously arranged among the parties, or that he knew that Dade had agreed to fill them up, as no evidence was given that Kirkwood took any part in the conversation. At the meeting, Wilson paid money to Kirkwood on account of other transactions. But at that meeting, Wilson told Kirkwood that he wanted the bill engraved which had been procured from Heywood's; and Kirkwood told Wilson he would do it for him, and he would do anything he wanted in that line, and £20 was the price mentioned for which he was to do it.

In three weeks or a month after this Wilson saw Kirkwood again

and gave him full instructions what to do, and made arrangements with him for £20, and he was to cut the bill plate and print about twenty of them, and on that day Wilson gave him the bill and paid him a balance to make up £20; this £20 Wilson had received from Collyer to pay on account of the bill being done. After this Wilson had communication with Collyer and Calvert about Heywood's bills; and in two or three weeks after Wilson again saw Kirkwood, and Kirkwood showed him the plate, and he and Kirkwood agreed that Kirkwood should procure the paper, which he did, and Wilson gave his opinion which was nearest Heywood's paper, and the bills were to be done upon that; and in a few days Kirkwood gave Wilson twenty-seven engravings of the plate of Heywood. Wilson afterwards delivered the bills so engraved to Calvert, to give to Dade. There were various other meetings between Wilson, Dade, Collyer, and Calvert, relative to these bills about the acceptance of Masterman, but the part Kirkwood took in the business ended with his delivery of the twenty-seven engravings to Wilson.

The bill in question was proved to be a forgery, the engraving was proved to be an impression of the plate which Kirkwood had shown to Wilson, and the signature and the whole of the filling up was proved to be in Dade's handwriting.

The counsel for the prosecution referred to Rex *v.* Bingley and others, Russ. and Ry. C. C. 446.

All the prisoners were convicted; but after the trial, the learned judge doubted whether the present case went quite the length of that and whether the conviction as far as related to Kirkwood was proper; and then if it was wrong as to him, the conviction of Collyer and Calvert, who were charged as accessories before the fact, would fall to the ground also, inasmuch as Dade was not upon his trial.

The learned judge respited the judgment till the next Assizes, that the opinion of the judges might be taken.

This case was considered at a meeting of all the judges, except Garrow, B., and Patteson, J., in Trinity term, 1831, and they were unanimously of opinion that Rex *v.* Bingley was rightly decided; that the ignorance of Stansfield and Kirkwood of those who were to effect the other parts of the forgery was immaterial; it was sufficient if he knew it was to be executed by somebody, and the conviction was affirmed.

Section 3. Principals in First and in Second Degree.

REX *v.* OWEN,

1 Moody C. C. 96 [1825].

The prisoner was tried as a receiver before Mr. Justice Gaselee at the Old Bailey Sessions, February, 1825, with John Debenham for stealing in the dwelling-house of Elizabeth Ladd clothes and watches above the value of forty shillings, the goods of William Henry Titswell.

Debenham and Titswell lodged at Mrs. Ladd's and slept in the same room. On the 1st of January, 1825, about six o'clock in the evening, Debenham, who had been out all day, returned and asked for a light to go upstairs to his room, where he remained about twenty minutes, and during that time he broke open Titswell's box and stole the property. Debenham then came downstairs and went out. In the way he gave the light to Mrs. Ladd at the door. Mrs. Ladd said that the prisoner when he went out at the door *had no bundle with him.* She went immediately upstairs, found the robbery had been committed, and gave the alarm. Owen, who had been seen walking forward and backward opposite the house and occasionally looking up, and Debenham were seen together by a patrol in a yard at some distance, and on seeing the patrol Debenham made off but Owen was taken with some of the property upon him.

In consequence of the landlady saying Debenham had no bundle it was suggested and the jury found that Debenham threw the things out of the window, and that Owen (whose defence was that he had picked up the bundle in the street) was in waiting to receive them, and they convicted Debenham capitally of stealing and Owen of receiving.

The learned judge was of opinion that under the circumstance of its being Debenham's own room and his therefore requiring no assistance to commit the felony, the conviction of Owen as receiver might have been supported if the jury had found that Debenham had brought the goods out and delivered them to Owen; but under the present finding the learned judge thought it at least doubtful and respited the sentence on him until the opinion of the judges could be taken.

In Easter term, 1825, the judges (Best, L. C. J., and Littledale, J., absent) met and considered this case and held that the prisoner was a principal and that the conviction of him as a receiver was wrong.

Section 4. Principal and Accessory.[1]

REX *v.* SOARES,

Russ. & Ry. 25 [1802].

The prisoners were tried before Mr. Justice Le Blanc at the Winchester Lent Assizes, in the year 1802, on an indictment charging them with feloniously uttering and publishing as true a certain false, forged, and counterfeit bank note for £5, knowing it to be forged, etc., with intent to defraud the Governor and Company of the Bank of England.

There were the other usual counts for forging and for disposing of and putting away the note with the like intent, and similar counts stating the intent to be to defraud the person to whom it was offered in payment.

It was proved that the prisoner, Brighton, offered the note in question in payment to one Henry Newland at Gosport; the other two prisoners, Soares and Atkinson, were not with Brighton at the time he so offered the note in payment, nor were they at the time in Gosport; but both of them were waiting at Portsmouth till Brighton should return to them, it having been previously concerted between the three prisoners that Brighton should go over the water, from Portsmouth to Gosport, for the purpose of passing the note, and when he had passed it should return to join the other two prisoners at Portsmouth. All the prisoners knew this was a forged note and had been concerned together in putting off another note of the same sort and in sharing among them the produce.

The counsel for Soares and Atkinson objected on their behalf that on the above evidence they were not guilty as charged by this indictment, not being present at the time that Brighton uttered the note nor so near as to be able to aid or assist him; and that they could be charged only as accessories before the fact.

The jury found that the forged note was uttered by the prisoner Brighton, by concert with the other two prisoners, and found them all three guilty.

[1] [As to the criminal responsibility of an accessory before the fact when the principal (*i. e.* the guilty agent) goes beyond his instructions, see Roscoe, Crim. Evid. (10th Eng. Ed.) 184; 1 Russ. Crimes, 62; Foster, P. C. 359, 370; 1 Hale, P. C. 617; Hawk. P. C. b. ii., c. 29, § 18; Stephen, Dig. 25, 26.]

The prisoner Brighton was left for execution, but judgment was respited as to the other two, — the counsel for the bank desiring to have an opportunity of arguing it, if on consideration they should think the indictment maintainable against the two prisoners who were not present.

This case was taken into consideration by all the judges on the first day of Easter term, 1802, and again in the same term on the 29th of May, 1802, when they were all of opinion that the conviction was wrong; that the two prisoners were not principals in the felony, not being present at the time of uttering or so near as to be able to afford any aid or assistance to the accomplice who actually uttered the note, and they thought it too clear to order an argument on it; an application was accordingly made to the Crown for a pardon.[1]

COMMONWEALTH v. PETTES, ABOVE, p. 129.

CHAPTER XIII.

INCOMPLETE ACTS.

SOLICITATIONS, ATTEMPTS, AND OTHER ACTS HAVING A CRIMINAL TENDENCY.

REGINA v. QUAIL,

4 F. & F. 1076 [1866].

THE prisoner was indicted for having incited John Chambers and Thomas Greenwood to rob their master.

It appeared from the evidence, that in October, 1864, the prisoner saw Chambers, who was then in the service of Messrs. Patterson, silk-throwsters, and proposed to him to rob his masters of silk, which he was to sell to the prisoner. Chambers said he would consider of it, and went away; but not intending to be concerned in the proposed robbery, kept out of the prisoner's way until the following February. In January, it was discovered that Messrs. Patterson had been robbed of some silk; and as the thief could not be discovered, several of their workmen and, among others, Chambers had notice to leave. Chambers thereupon went to Greenwood, a servant who enjoyed the Messrs. Patterson's confidence, and told him of the conversation he had had

[1] Vide Davis and Hall's Case, Pasch. 1806, *post*; Else's Case, Pasch. 1808, *post*.

with Quail; and it was arranged that Chambers should go in search of Quail and bring him to Greenwood, who was to appear willing to enter into the plan of robbing his employers, the object being to discover whether Quail knew anything of the robbery that had already taken place. This object was carried out by Chambers, who went to Quail and proposed that he should go to see Greenwood at a certain public-house. Quail did so and there proposed to Greenwood to rob his employers, offering to buy any silk that Greenwood could bring him. Greenwood afterwards disclosed what had taken place to his employers; and Quail was arrested and indicted on the present charge.

Cave, for the prisoner, submitted first, that the mere inciting a man to rob his master was not a crime; secondly, that at any rate it was only a crime when the incitement related to some specific, designated article, while in this case the incitement was to steal silk generally without any specific parcel being indicated; and thirdly, that as the witnesses had previously formed a plan of betraying the prisoner and had themselves sought the interview with the predetermined intention of revealing what took place to their masters, there never was any risk of their being induced to commit the robbery; and so the crime of inciting them to do so was not committed.

Willes, J., observed that it had been held in R. *v.* Higgins [1] that it was a misdemeanor at common law to incite a servant to rob his master, and he was not inclined to overrule that decision. As to the second point, he thought the incitement was sufficiently definite. Greenwood was to steal a part of the silk confided to his care by his masters. The third point was also bad. The crime was complete, so far as the prisoner was concerned; and if it was necessary that the persons incited should be in a position to commit the robbery, they were so here, for they might have been persuaded to give up their intention of denouncing the prisoner and to join with him in robbing their master.

Verdict, guilty.

THE QUEEN *v.* CHAPMAN,

1 Den. C. C. 432 [1849].

The defendant was convicted at the last Spring Assizes for Somerset, A. D. 1849, before the Right Hon. Lord Denman, C. J., when several points arising on the indictment and evidence were reserved for the decision of the judges, under the St. 11 & 12 Vict. c. 78.

[1] 2 East. 5.

[The indictment was for making a false oath before a surrogate for the purpose of obtaining a marriage license.]

The case was argued on 2d June, 1849, before Lord DENMAN, C. J., PARKE, B., PATTERSON, J., COLTMAN, J., V. WILLIAMS, J.

. . . . . .

LORD DENMAN, C. J. I think I was perhaps over cautious in reserving this case. It seems clearly a misdemeanor. The prisoner goes to a public officer and takes a false oath to get a license; whether the marriage was or was not celebrated in consequence is immaterial; any step taken with a view to the commission of a misdemeanor is a misdemeanor. The officer has possessed and executed the power of administering an oath since 1603 and by a late act of Parliament is empowered to do so in *consimili casu.* I pronounce no opinion on the question of perjury.

PARKE, B. The 3d count is supported. It is there distinctly averred that the prisoner swore falsely respecting Sarah Fry; any one material fact falsely sworn to is sufficient to support the charge. Then as the false oath is sufficiently alleged, the only question is as to the surrogate's power to administer the oath, — not such an oath as will support an assignment of perjury, but as will make a party guilty of a misdemeanor. By the canon law the surrogate had such power. To make a false oath, in order to procure a marriage license from an officer empowered to grant such license, is a misdemeanor, because it is a step toward the accomplishment of a misdemeanor. The actual celebration of the marriage is immaterial. Anything essentially connected with marriage is a matter of public concern, and therefore may involve criminal consequences.

PATTERSON, J. The general power in a surrogate to administer an oath is sufficient. The St. 4 Geo. IV. c. 76, seems to assume that power. The argument drawn from the fact that the prisoner was not the real person would make the very fraud committed by him a ground of defence. The intent is sufficiently expressed; the third count is free from objection.

COLTMAN, J., V. WILLIAMS, J., concurred.

Verdict entered on the third count.

As to attempts where success is in fact impossible, see cases cited in Chapter 8, above, and Regina *v.* James, 1 C. & K. 530.

CHAPTER XIV.

Criminal Liability.

Contributory Guilt or Negligence.

Section 1. Contributory Guilt.

REGINA *v.* HUDSON, ET AL.,
8 Cox C. C. 305 [1860].

COURT OF CRIMINAL APPEAL.

Case reserved for the opinion of this court, by J. B. Maule, Esq., barrister-at-law, sitting as Deputy for the Recorder of York.

At the Epiphany Sessions, 1860, held for the city of York, the prisoners were jointly indicted and tried before me upon an indictment, the two first counts of which charged them with an offence under the 8 & 9 Vict. c. 109, as follows: —

First count charged "That on the 18th November, 1859, by fraud, unlawful device, and ill practice in playing at a certain game or sport, to wit, in and by a wager with one Abraham Rhodes, whether a certain pencil-case had a pen in it or not, unlawfully and fraudulently they did win from the said Abraham Rhodes, to a certain person to the jurors unknown, a certain sum of money, to wit, £2 10*s*. of the money of the said A. Rhodes, and so did then and thereby unlawfully obtain such money from the said A. Rhodes by a false pretence, to wit, by the fraud, unlawful device, and ill practice aforesaid, with intent then to cheat and defraud the said A. Rhodes of the same, against the form of the statute in such case made and provided," etc.

The second count charged the prisoners that they unlawfully and fraudulently did combine, confederate, and conspire together, and with divers other persons to the jurors unknown, by fraud, unlawful device, and ill practice in playing at a certain game or sport, and by divers other fraudulent devices and false pretences, unlawfully to win from the said A. Rhodes a certain sum of money, to wit, the sum of £2 10*s*. of the money of the said A. Rhodes, and so then and thereby unlawfully to obtain from the said A. Rhodes the said sum of money in this count mentioned, by a false pretence, with intent then to cheat and defraud the said A. Rhodes of the same, against the form of the statute, etc.

Third count. The prisoners were charged with a conspiracy to cheat in the following form: —

"That they unlawfully and fraudulently did combine, confederate, and conspire together with divers other persons to the jurors unknown, by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to obtain from the said A. Rhodes the sum of £2 10*s.* of the money of the said A. Rhodes, and unlawfully to cheat and defraud the said A. Rhodes of the same, against the peace, etc.

The evidence disclosed that the three prisoners were in a public-house together with the prosecutor, Abraham Rhodes, and that in concert with the other two prisoners, the prisoner John Dewhirst placed a pen-case on the table in the room where they were assembled and left the room to get writing-paper. While he was absent the other two prisoners, Samuel Hudson and John Smith, were the only persons left drinking with the prosecutor; and Hudson then took up the pen-case and took out the pen from it, placing a pin in the place of it, and put the pen that he had taken out under the bottom of the prosecutor's drinking-glass; and Hudson then proposed to the prosecutor to bet the prisoner Dewhirst when he returned that there was no pen in the pen-case. The prosecutor was induced by Hudson and Smith to stake 50*s.* in a bet with Dewhirst upon his returning into the room, that there was no pen in the pen-case; which money the prosecutor placed on the table, and Hudson snatched up to hold. The pen-case was then turned up into the prosecutor's hand, and another pen with the pin fell into his hand, and then the prisoners took his money.

Upon this evidence it was objected, on behalf of the prisoners, that no offence within the meaning of the 8 & 9 Vict. c. 109, was proved by it, and that the facts proved in evidence did not amount to the offence charged in the third count.

I thought the objection well founded as to the offence under the 8 & 9 Vict. c. 109, but held that the facts in evidence amounted to the offence charged in the third count, and directed the jury to return a separate verdict on each count, a case having been asked for by the prisoners' counsel, for the consideration of the Court for Crown Cases Reserved.

The jury returned a verdict of guilty on each of the three counts.

The prisoners were sentenced to eight months' imprisonment and committed to prison for want of sufficient sureties.

If the Court for the consideration of Crown Cases Reserved shall be of opinion that the above facts in evidence constituted in law any one of the offences charged in the indictment and was evidence to go to

the jury in support thereof, the verdict is to stand for such of the counts in which the offence is laid to which the evidence applies.

Price for the prisoners. It is submitted that the prisoners have not been guilty of any of the offences charged in the several counts of the indictment. The first two counts of the indictment are framed upon the Games and Wagers Act, 8 & 9 Vict. c. 109, § 17, which enacts: "That every person who shall by any fraud, or unlawful device, or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly." The object of that provision was not to meet a case like the present. Sects. 8 and 15 show that the provision was directed to the ordinary games played at common gaming-houses, and not against tricks like the one in this case.

POLLOCK, C. B. You may confine your argument to the offence charged in the third count.

Price. As to the third count, to sustain that the evidence should have shown such a false pretence as *per se* would constitute the ordinary misdemeanor of false pretences.

POLLOCK, C. B. Why so? This is a count for conspiracy to cheat.

Price. Yes, by false pretences.

CHANNELL, B. If the count had said merely to conspire and had omitted the words "by false pretences," it would have been good.

BLACKBURN, J. Here the prisoners cheated the prosecutor into the belief that he was going to cheat, when in fact he was to be cheated.

Price. This is a mere private deceit not concerning the public, which the criminal law does not regard, but is a deceit against which common prudence might be guarded. There is no evidence of any indictable combination to cheat and defraud.

CHANNELL, B. If two persons conspire to puff up the qualities of a horse and thereby secure an exorbitant price for it, that is a criminal offence.

Price. That affects the public. At the trial the present case was likened to that of Rex *v.* Barnard (7 C. & P. 784), where a person at Oxford, who was not a member of the university, went for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods. This was held a sufficient false pretence. The present case, however, was nothing more than a bet on a question of fact, which the prosecu-

tor might have satisfied himself of by looking at the pencil-case. It is more like an ordinary conjuring-trick. Besides, here the prosecutor himself intended to cheat one of the prisoners by the bet.

No counsel appeared for the prosecution.

POLLOCK, C. B. We are all of opinion that the conviction on the third count is good and ought to be supported. The count is in the usual form, and it is not necessary that the words "false pretences" stated in it should be understood in the technical sense contended for by Mr. Price. There is abundant evidence of a conspiracy by the prisoners to cheat the prosecutor, and though one of the ingredients in the case is that the prosecutor himself intended to cheat one of the prisoners, that does not prevent the prisoners from liability to be prosecuted upon this indictment. *Conviction affirmed.*

THE QUEEN *v.* ——,

1 Cox C. C. 250 [1845].

THE defendant was indicted for uttering counterfeit coin. Evidence was adduced to show that he had given a counterfeit sovereign to a girl with whom he had had intercourse.

Bodkin, in opening the case for the prosecution, referred to R. *v.* Page (8 C. & P. 122), in which Lord Abinger ruled that the giving a piece of counterfeit money away in charity was not an uttering within the 2 Wm. IV. c. 34, § 7, although the person giving knew it to be counterfeit, as there must be some intention to defraud. The learned counsel contended that the present case was clearly distinguishable, even supposing that to be the law, and he apprehended that the question for the jury would be, whether the coin had been passed with a knowledge of its being counterfeit and with the intention of putting it into circulation.

LORD DENMAN, C. J. (*in summing up*). As to the law of this case, my learned brother (COLTMAN, J.) and myself are clearly of opinion that if the defendant gave the coin to the woman under the circumstances stated, knowing it to be counterfeit, he is guilty of the offence charged. We do not consider the decision of Lord Abinger to be in point; that was a case of charity; at the same time we have great doubts as to the correctness of that ruling, and if a similar case were to arise we should reserve the point.

COMMONWEALTH *v.* MORRILL,

8 Cush. 571 [1851].

This was an indictment which alleged that the defendants, Samuel G. Morrill and John M. Hodgdon, on the 17th of September, 1850, at Newburyport, "devising and intending one James Lynch by false pretences to cheat and defraud of his goods, did then and there unlawfully, knowingly, and designedly falsely pretend and represent to said Lynch that a certain watch which said Morrill then and there had, and which said Morrill and Hodgdon then and there proposed and offered to exchange with said Lynch for two other watches belonging to said Lynch, was a gold watch of eighteen carats fine and was of great value, to wit, of the value of eighty dollars; and the said Lynch, then and there believing the said false pretences and representations so made as aforesaid by said Morrill and Hodgdon, and being deceived thereby, was induced by reason of the false pretences and representations so made as aforesaid to deliver, and did then and there deliver, to the said Morrill the two watches aforesaid, belonging to said Lynch, and of the value of twenty dollars, and the said Morrill and Hodgdon did then and there receive and obtain the two said watches, the property of said Lynch, as aforesaid, in exchange for the said watch, so represented as a gold watch as aforesaid, by means of the false pretences and representations aforesaid, and with intent to cheat and defraud the said Lynch of his said two watches, as aforesaid; whereas in truth and in fact said watch so represented by said Morrill and Hodgdon as a gold watch, eighteen carats fine, and of the value of eighty dollars, was not then and there a gold watch, and was not then and there eighteen carats fine, and was then and there of trifling value," etc.

At the trial in the Court of Common Pleas, before Hoar, J., it appeared in evidence that Lynch represented his watches, one of which was of silver and the other of yellow metal, as worth fifty dollars; and on the testimony of the only witness for the Commonwealth, who was a judge of the value of watches, they were worth not exceeding fifteen dollars. Lynch testified that his silver watch cost him fifteen dollars; that he received the other in exchange for two, which cost him respectively seven dollars and thirteen dollars; and that he believed it to be worth thirty dollars.

The defendant requested the presiding judge to instruct the jury that if Lynch's watches were not worth fifty dollars, or some considerable part of that sum, but were of merely trifling value, this indictment

could not be maintained. But the judge instructed the jury that if they supposed that each of the parties was endeavoring to defraud the other, and Lynch knew that his watches were of little value, the jury should not convict the defendants merely because they had the best of the bargain; but that if the defendants made the false representations charged in the indictment, with the intent to defraud, knowing them to be false, and they were such as would mislead and deceive a man of ordinary prudence, and Lynch, by reason of the representations, and trusting in them, parted with his property and was defrauded, it was not necessary to show that he was defrauded to the extent charged in the indictment, provided he in good faith parted with property which he believed to be valuable, and was defrauded to any substantial amount, for example, to the amount of five dollars; and that the defendants might be convicted, although, from the mistake of Lynch in over-estimating his property, he might not have been cheated to so great an extent as he at the time supposed.

The jury found the defendants guilty, who thereupon moved in arrest of judgment, on the ground that the indictment was insufficient; and this motion being overruled, they alleged exceptions to the order of the court, overruling the same, and also to the instructions aforesaid.

DEWEY, J. The exceptions taken to the instructions of the presiding judge cannot be sustained. If it were true that the party, from whom the defendants obtained goods by false pretences, also made false pretences as to his goods, which he exchanged with the defendants, that would be no justification for the defendants, when put on trial upon an indictment charging them with obtaining goods by false pretences, knowingly and designedly in violation of a statute of this Commonwealth. Whether the alleged misrepresentation of Lynch, being a mere representation as to the value or worth of a certain watch and an opinion rather than a statement of a fact, would be such false pretence as would render him amenable to punishment under this statute, might be questionable; but supposing that to be otherwise and it should appear that Lynch had also violated the statute, that would not justify the defendants. If the other party has also subjected himself to a prosecution for a like offence, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally.

. . . . . .

McCORD *v.* THE PEOPLE,

46 N. Y. 470 [1871].

ERROR to the General Term of the Supreme Court in the first department to review judgment, affirming judgment of the Court of General Sessions in and for the County of New York, convicting the plaintiff in error upon an indictment for false pretences.

The plaintiff in error, Henry McCord, was tried and convicted in the Court of General Sessions of the Peace, in and for the County of New York at the June term, 1870, upon an indictment charging in substance that with intent to cheat and defraud one Charles C. Miller, he falsely and fraudulently represented, —

"That he, the said Henry McCord, was an officer attached to the bureau of Captain John Young's department of detectives, and that he had a warrant issued by Justice Hogan, one of the police justices of the city of New York, at the complaint of one Henry Brinker, charging the said Charles C. Miller with a criminal offence and for his arrest; and that the said Henry Brinker had promised him, the said Henry McCord, $200 for the arrest of him, the said Charles C. Miller."

And that said Miller, believing such false representations, was induced to and did deliver to McCord a gold watch and a diamond ring.

. . . . . .

PER CURIAM. If the prosecutor parted with his property upon the representations set forth in the indictment, it must have been for some unlawful purpose, a purpose not warranted by law. There was no legitimate purpose to be attained by delivering the goods to the accused upon the statements made and alleged as an inducement to the act. What action by the plaintiff in error was promised or expected in return for the property given is not disclosed. But whatever it was, it was necessarily inconsistent with his duties as an officer having a criminal warrant for the arrest of the prosecutor, which was the character he assumed. The false representation of the accused was that he was an officer and had a criminal warrant for the prosecutor. There was no pretence of any agency for or connection with any person or of any authority to do any act save such as his duty as such pretended officer demanded.

The prosecutor parted with his property as an inducement to a supposed officer to violate the law and his duties; and if in attempting to do this he has been defrauded, the law will not punish his confederate, although such confederate may have been instrumental in inducing the

commission of the offence. Neither the law or public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness as between each other in their dishonest practices. The design of the law is to protect those who, for some honest purpose, are induced upon false and fraudulent representations to give credit or part with their property to another, and not to protect those who for unworthy or illegal purposes part with their goods. People *v.* Williams, 4 Hill, 9; Same *v.* Stetson, 4 Barb. 151.

The judgment of the Supreme Court and of the Sessions must be reversed and judgment for the defendant.

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[PECKHAM, J., delivered a dissenting opinion.][1]

SECTION 2. CONTRIBUTORY NEGLIGENCE.

REGINA *v.* BIRCHALL,

4 F. & F. 1087 [1866].

THE prisoner was indicted for the manslaughter of William Wilson, at Sedbergh, on the 10th of January.

It appeared that the prisoner was an engine-driver in the service of the London and North-Western Railway Company, and on the occasion in question was driving his engine from Low Gill to Ingleton. Before him, on the same line of rails, was another engine with a van, the driver of which had received orders to stop at Sedbergh and Middleton for the purpose of taking up some workmen, and at Barton to connect some wagons. When they got to Barton, the engine was shunted on to a siding for the purpose of taking up the wagons, leaving the van containing the workmen standing on the main line. At this moment the prisoner's engine came in sight, and the men in the van, perceiving that it was approaching at such a pace that a collision was inevitable, all jumped out with the exception of Wilson and got safely away. For some unknown reason Wilson did not move and was killed in the collision which took place. Upon his examination before the magistrates, the prisoner stated that the injectors of his engine were out of order, and that, while attending to them, he had told his firemen to look out for signals.

WILLES, J., observed that the engine-driver's first duty was to attend to his engine; and as the prisoner was engaged in so doing and had given directions to the fireman to look out for signals, the latter,

[1] [See People *v.* Stimson, 4 Barb. 151 (1848); People *v.* Wilson, 6 Johns. 320 (1810).]

and not the driver, was responsible for the negligence which caused the deceased's death. Moreover, it appeared that the deceased had contributed to the fatal result by not getting out of the way as the other men had done, and until he saw a decision to the contrary, he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action. *Verdict, not Guilty.*

REGINA *v.* KEW ET AL.,

12 Cox C. C. 355 [1875].

THE prisoners were indicted for manslaughter. It appeared that on the 2d of June the prisoner, Jackson, who was in the employ of Mr. Harris, a farmer, was instructed to take his master's horse and cart and drive the prisoner Kew to the Bungay railway station. Being late for the train, Jackson was driving at a furious rate, at full gallop, and ran over a child going to school and killed it. It was about two o'clock in the afternoon, and there were four or five little children from five to seven years of age going to school unattended by any adult.

Metcalfe and *Simms Reeve*, for the prisoners, contended that there was contributory negligence on behalf of the child running on the road, and that Kew was not liable for the acts of another man's servant, he having no control over the horse and not having selected either the horse or the driver.

BYLES, J., after reading the evidence, said: Here the mother lets her child go out in the care of another child only seven years of age, and the prisoner Kew is in the vehicle of another man, driven by another man's servant, so not only was Jackson not his servant but he did not even select him. It has been contended if there was contributory negligence on the children's part, then the defendants are not liable. No doubt contributory negligence would be an answer to a civil action. But who is the plaintiff here? The Queen, as representing the nation; and if they were all negligent together I think their negligence would be no defence, even if they had been adults. If they were of opinion that the prisoners were driving at a dangerous pace in a culpably negligent manner, then they are guilty. It was true that Kew was not actually driving, but still a word from him might have prevented the accident. If necessary, he would reserve the question of contributory negligence as a defence for the Court of Criminal Appeal.

The jury acquitted both prisoners.[1]

[1] [See also Regina *v.* Swindall, 2 Cox C. C. 141; Regina *v.* Longbottom, 3 Cox C. C. 439.]

CHAPTER XV.

Criminal Liability.

Authorization; Consent.

Section 1. Authorization.

REGINA v. LESLEY,

Bell C. C. 220; 8 Cox C. C. 269 [1860].

. . . . . .

Erle, C. J. In this case the question is whether a conviction for false imprisonment can be sustained upon the following facts.

The prosecutor and others, being in Chili, and subjects of that State, were banished by the government from Chili to England.

The defendant, being master of an English merchant vessel lying in the territorial waters of Chili, near Valparaiso, contracted with that government to take the prosecutor and his companions from Valparaiso to Liverpool, and they were accordingly brought on board the defendant's vessel by the officers of the government and carried to Liverpool by the defendant under his contract. Then, can the conviction be sustained for that which was done within the Chilian waters? We answer no.

We assume that in Chili the act of the government toward its subjects was lawful; and although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign State, yet in other respects she is subject to the laws of that State as to acts done to the subjects thereof.

We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the government and under its authority. In Dobree *v.* Napier[1] the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of Portugal, in her own territory, had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman seizing an English vessel, could justify the act under the employment of the Queen.

We think that the acts of the defendant in Chili become lawful

[1] 2 Bing. N. C. 781.

on the same principle, and that there is therefore no ground for the conviction.

The further question remains, Can the conviction be sustained for that which was done out of the Chilian territory? And we think it can.

It is clear that an English ship on the high sea, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil. In Regina *v.* Sattler [1] this principle was acted on, so as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea. The same principle has been laid down by foreign writers on international law, among which it is enough to cite *Ortolan*, "Sur la Diplomatic de la Mer," liv. 2. cap. 13.

The Merchant Shipping Act, 17 & 18 Vict. c. 104 § 267, makes the master and seamen of a British ship responsible for all offences against property or person committed on the sea out of her Majesty's dominions as if they had been committed within the jurisdiction of the Admiralty of England.

Such being the law, if the act of the defendant amounted to a false imprisonment he was liable to be convicted. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment.

It may be that transportation to England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects; but for an English ship the laws of Chili, out of the State, are powerless, and the lawfulness of the acts must be tried by English law.

For these reasons, to the extent above mentioned, the conviction is affirmed. *Conviction confirmed accordingly.*

Section 2. Consent.

REGINA *v.* MARTIN,

2 Moody C. C. 123 [1840.]

The prisoner was tried before Mr. Baron Alderson upon an indictment, the first count of which charged him with carnally knowing and

[1] Dears. & Bell's C. C. R. 525.

abusing Esther Ricketts, a girl above ten and under twelve years of age.

. . . . . .

Godson for the prisoner contended that, supposing the fact to have been done by the consent of the prosecutrix, no conviction could take place on the second and third counts.

The learned judge left the question to the jury, who found the fact that the prosecutrix had consented; and he then directed a verdict of guilty on the ground that the prosecutrix was by law incapable of giving her consent to what would be a misdemeanor by statute.

But as *Godson* stated that the point was doubtful and had been otherwise decided before, the learned judge respited the judgment.

It appeared to the learned judge clear that if the indictment had charged an attempt to commit the statutable misdemeanor, the prisoner would clearly have been liable to conviction; but the learned judge was not free from doubt as to the present case, in which an assault was charged.

This case was considered at a meeting of the judges in Hilary term, 1840, and they all thought that the proper charge was of a misdemeanor in attempting to commit a statutable offence, and that the conviction was wrong.[1]

CHAPTER XVI.

Assault and Battery.

COMMONWEALTH *v.* WHITE,

110 Mass. 407 [1872].

Complaint to a trial justice, alleging that the defendant "with force and arms in and upon the body of Timothy Harrington an assault did make, and him did then and there threaten to shoot with a gun, which he then and there pointed and aimed at said Harrington."

At the trial, on appeal, in the Superior Court, before Pitman, J., the Commonwealth introduced evidence tending to show that the defendant was driving in a wagon along a highway which Harrington, one

[1] [See The Queen *v.* Read, 1 Den. C. C. 377.]

Sullivan, and others were repairing; that Sullivan called out to the defendant to drive in the middle of the road; that the defendant made an offensive reply; that thereupon Sullivan came toward the defendant and asked him what he meant; that Sullivan and Harrington were about fifteen feet from the defendant, who was moving along all the time; that the defendant took up a double-barrel gun which he had in the wagon, pointed it toward Sullivan and Harrington, took aim at them, and said, "I have got something here that will pick the eyes off you." This was all the evidence of declarations or threats of the defendant at the time of the alleged assault.

Sullivan testified that he had no fear and did not suppose the defendant was going to do any harm; but there was evidence tending to show that Harrington was put in fear. The defendant testified that the gun was not loaded.

The defendant asked the judge to rule that the complaint could not be sustained because the Commonwealth had failed to prove the offence as alleged in the complaint; but the judge refused so to rule, and ruled that it was not necessary to prove a threat to shoot as set forth in the complaint.

The defendant also asked the judge to instruct the jury "that the facts testified to did not constitute an assault; that at the time, the defendant must have had an intention to do some bodily harm to Harrington and the present ability to carry his intention into execution; and that the whole evidence would not warrant the jury in finding a verdict against the defendant." But the judge refused so to instruct the jury and instructed them "that an assault is any unlawful physical force partly or fully put in motion, which creates a reasonable apprehension of immediate physical injury; and that if the defendant, within shooting distance, menacingly pointed at Harrington a gun, which Harrington had reasonable cause to believe was loaded, and Harrington was actually put in fear of immediate bodily injury therefrom, and the circumstances of the case were such as ordinarily to induce such fear in the mind of a reasonable man, that then an assault was committed, whether the gun was in fact loaded or not." The jury returned a verdict of guilty, and the defendant alleged exceptions.

. . . . . .

WELLS, J. . . . The instructions required the jury to find that the acts of the defendant were done "menacingly;" that Harrington had reasonable cause to believe the gun pointed at him was loaded, and was actually put in fear of immediate bodily injury therefrom; and that the circumstances were such as ordinarily to induce such fear in the mind of a reasonable man.

Instructions in accordance with the second ruling prayed for would

have required the jury also to find that the defendant had an intention to do some bodily harm and the present ability to carry his intention into execution. Taking both these conditions literally, it is difficult to see how an assault could be committed without a battery resulting.

It is not the secret intent of the assaulting party nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace.[2]

. . . . . .

Exceptions overruled.

COMMONWEALTH *v.* STRATTON,

114 Mass. 303 [1873].

Indictments, each charging that the defendant, upon a certain young woman in the indictment named, made an assault and administered to her a large quantity of cantharides, "the same being . . . a deleterious and destructive drug," with intent to injure her health, whereby she became sick, and her life was despaired of. Both cases were tried together.

It appeared at the trial in the Superior Court, before Devens, J., that the defendant, in company with another young man, called upon the young women in the indictments named, and during the call offered them some figs, which they ate, they having no reason to suppose that the figs contained any foreign substance; that a few hours after, both young women were taken sick and suffered pain for some hours; that the defendant and his companion had put into the figs something they had procured by the name of "love powders," which was represented by the person of whom they got it to be perfectly harmless.

There was evidence that one of the ingredients of these powders was cantharides, and that this would tend to produce sickness like that which the young women suffered.

The Court instructed the jury that if it was shown beyond a reasonable doubt "that the defendant delivered to the women a harmless article of food, as figs, to be eaten by them, he well knowing that a foreign substance or drug was contained therein, and concealing the fact, of

[1] [See Beach *v.* Hancock, 27 N. H. 223, State *v.* Shepherd, 10 Iowa, 126.]

which he knew the women to be ignorant, that such foreign substance or drug was contained therein, and the women eating thereof by the invitation of the defendant were injured in health by the deleterious character of the foreign substance or drug therein contained, the defendant should be found guilty of an assault upon them, and this, although he did not know the foreign substance or drug was deleterious to health, had been assured that it was not, and intended only to try its effect upon them, it having been procured by him under the name of a 'love powder,' and he being ignorant of its qualities or of the effects to be expected from it."

The jury found the defendant guilty of a simple assault in each case, and he alleged exceptions.

WELLS, J.[1] All the judges concur that the evidence introduced at the trial would warrant a conviction of assault and battery or for a simple assault, which it includes; and in the opinion of a majority of the court, the instructions given required the jury to find all that was essential to constitute the offence of assault and battery.

The jury must have found a physical injury inflicted upon another person by a voluntary act of the defendant directed toward her, which was without justification and unlawful. Although the defendant was ignorant of the qualities of the drug he administered and of the effects to be expected from it, and had been assured and believed that it was not deleterious to health, yet he knew it was not ordinary food, that the girl was deceived into taking it, and he intended that she should be induced to take it without her conscious consent, by the deceit which he practised upon her. It is to be inferred from the statement of the case that he expected it would produce some effect. In the most favorable aspect of the facts for the defendant he administered to the girl, without her consent and by deceit, a drug or "foreign substance," of the probable effect of which he was ignorant, with the express intent and purpose "to try the effect of it upon" her. This in itself was unlawful, and he must be held responsible for whatever effect it produced. Being an unlawful interference with the personal rights of another, calculated to result and in fact resulting in physical injury, the criminal intent is to be inferred from the nature of the act and its actual results. 3 Bl. Com. 120; Rex *v.* Long, 4 C. & P. 398, 407, note. The deceit, by means of which the girl was induced to take the drug, was a fraud upon her will, equivalent to force in overpowering it. Commonwealth *v.* Burke, 105 Mass. 376; Regina *v.* Lock, 12 Cox C. C. 244; Regina *v.* Sinclair, 13 Cox C. C. 28.

Although force and violence are included in all definitions of assault,

[1] This case was . . . considered by all the judges.

or assault and battery, yet where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts. In 3 Chit. Crim. Law, 799, is a count, at common law, for an assault with drugs. For other instances of assault and battery without actual violence directed against the person assaulted, see 1 Gabbett's Crim. Law, 82; Rosc. Crim. Ev. (8th ed.) 296; 3 Bl. Com. 120 and notes; 2 Greenl. Ev. § 84.

If one should hand an explosive substance to another and induce him to take it by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery, and that would necessarily include an assault; although he might not be guilty even of an assault, if the substance failed to explode or failed to cause any injury. It would be the same if it exploded in his mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured externally or internally, by mechanical or chemical force.

In Regina *v.* Button, 8 C. & P. 660, one who put Spanish flies into coffee to be drunk by another was convicted of an assault upon the person who took it, although it was done "only for a lark." This decision is said to have been overruled in England. Regina *v.* Dilworth, 2 Mood. & Rob. 531; The Queen *v.* Walkden, 1 Cox C. C. 282; Regina *v.* Hanson, 2 C. & K. 912. In the view of the majority of the court, the last only of these three cases was a direct adjudication, and that entirely upon the authority of mere *dicta* in the other two and without any satisfactory reasoning or statement of grounds; and the earlier decision in Regina *v.* Button is more consistent with general principles, and the better law. *Exceptions overruled.*

COMMONWEALTH *v.* DONAHUE,

148 Mass. 529 [1889].

Holmes, J. This is an indictment for robbery, on which the defendant has been found guilty of an assault. The evidence for the Commonwealth was, that the defendant had bought clothes, amounting to twenty-one dollars and fifty-five cents, of one Mitchelman, who called at the defendant's house by appointment for his pay; that some discussion arose about the bill, and that the defendant went upstairs,

brought down the clothes, placed them on a chair, and put twenty dollars on a table, and told Mitchelman that he could have the money or the clothes; that Mitchelman took the money and put it in his pocket and told the defendant he owed him one dollar and fifty-five cents, whereupon the defendant demanded his money back, and on Mitchelman refusing, attacked him, threw him on the floor, and choked him until Mitchelman gave him a pocket-book containing twenty-nine dollars. The defendant's counsel denied the receiving of the pocket-book and said that he could show that the assault was justifiable under the circumstances of the case, as the defendant believed that he had a right to recover his own money by force, if necessary. The presiding justice stated that he should be obliged to rule that the defendant would not be justified in assaulting Mitchelman to get his own money, and that he should rule as follows: "If the jury are satisfied that the defendant choked and otherwise assaulted Mitchelman, they would be warranted in finding the defendant guilty, although the sole motive of the defendant was by this violence to get from Mitchelman by force money which the defendant honestly believed to be his own." Upon this the defendant saved his exceptions and declined to introduce evidence; the jury were instructed as stated and found the defendant guilty.

On the evidence for the Commonwealth, it appeared, or at the lowest the jury might have found, that the defendant offered the twenty dollars to Mitchelman only on condition that Mitchelman should accept that sum as full payment of his disputed bill, and that Mitchelman took the money, and at the same moment, or just afterwards, as part of the same transaction, repudiated the condition. If this was the case, — since Mitchelman, of course, whatever the sum due him, had no right to that particular money except on the conditions on which it was offered, Commonwealth *v.* Stebbins, 8 Gray, 492, — he took the money wrongfully from the possession of the defendant, or the jury might have found that he did, whether the true view be that the defendant did not give up possession, or that it was obtained from him by Mitchelman's fraud. Commonwealth *v.* Devlin, 141 Mass. 423, 431; Chisser's Case, T. Raym. 275, 276; Regina *v.* Thompson, Leigh & Cave, 225; Regina *v.* Stanley, 12 Cox C. C. 269; Regina *v.* Rodway, 9 C. & P. 784; Rex *v.* Williams, 6 C. & P. 390; 2 East P. C. c. 16, §§ 110, 113. See Regina *v.* Cohen, 2 Den. C. C. 249, and cases *infra*. The defendant made a demand, if that was necessary, which we do not imply, before using force. Green *v.* Goddard, 2 Salk. 641; Polkinhorn *v.* Wright, 8 Q. B. (N. S.) 197; Commonwealth *v.* Clark, 2 Met. 23, 25, and cases *infra*.

It is settled by ancient and modern authority, that under such cir-

cumstances a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon. Commonwealth *v.* Lynn, 123 Mass. 218; Commonwealth *v.* Kennard, 8 Pick. 133; Anderson *v.* State, 6 Baxter, 608; State *v.* Elliot, 11 N. H. 540, 545; Rex *v.* Milton, Mood. & Malk. 107; Y. B. 9 Ed. IV. 28, pl. 42; 19 Hen. VI. 31, pl. 59; 21 Hen. VI. 27, pl. 9. See Seaman *v.* Cuppledick, Owen, 150; Taylor *v.* Markham, Cro. Jac. 224, S. C. Yelv. 157, and 1 Brownl. 215; Shingleton *v.* Smith, Lutw. 1481, 1483; 2 Inst. 316; Finch, Law, 203; 2 Hawk. P. C. c. 60, § 23; 3 Bl. Com. 121. To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned. Baldwin *v.* Hayden, 6 Com. 453; Y. B. 19 Hen. VI. 31, pl. 59; Rogers *v.* Spence, 13 M. & W. 571, 581; 2 Hawk. P. C. c. 60, § 23; 3 Bl. Com. 120, 131.

We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defence, but involve other considerations of policy. It has been held, that even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession, in like manner as he might have protected it without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the civil and the criminal law. Blades *v.* Higgs, 10 C. B. (N. S.) 713; 12 C. B. (N. S.) 501; 13 C. B. (N. S.) 844; and 11 H. L. Cas. 621; Commonwealth *v.* McCue, 16 Gray, 226, 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted through the fraud of the latter. Hodgeden *v.* Hubbard, 18 Vt. 504. See Johnson *v.* Perry, 56 Vt. 703. On the other hand, a distinction has been taken between the right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful. Bobb *v.* Bosworth, Litt. Sel. Cas. 81. See Barnes *v.* Martin, 15 Wis. 240; Andre *v.* Johnson, 6 Blackf. 375; Davis *v.* Whitridge, 2 Strobh. 232; 3 Bl. Com. 4. It is unnecessary to decide whether, in this case, if Mitchelman had taken the money with a fraudulent intent but had not repudiated the condition until afterwards, the defendant would have had any other remedy than to hold him to his bargain if he could, even if he knew that Mitchelman still had the identical money upon his person.

If the force used by the defendant was excessive, the jury would have been warranted in finding him guilty. Whether it was excessive or

not was a question for them; the judge could not rule that it was not, as matter of law. Commonwealth *v.* Clark, 2 Met. 23. Therefore the instruction given to them, taken only literally, was correct. But the preliminary statement went further and was erroneous; and coupling that statement with the defendant's offer of proof and his course after the rulings, we think it fair to assume that the instruction was not understood to be limited, or indeed to be directed to the case of excessive force, which, so far as appears, had not been mentioned, but that it was intended and understood to mean that any assault to regain his own money would warrant finding the defendant guilty. Therefore the exceptions must be sustained.

It will be seen that our decision is irrespective of the defendant's belief as to what he had a right to do. If the charge of robbery had been persisted in, and the difficulties which we have stated could have been got over, we might have had to consider cases like Regina *v.* Boden, 1 C. & K. 395, 397; Regina *v.* Hemmings, 4 F. & F. 50; State *v.* Hollyway, 41 Iowa, 200. Compare Commonwealth *v.* Stebbins, 8 Gray, 492; Commonwealth *v.* McDuffy, 126 Mass. 467. There is no question here of the effect of a reasonable but mistaken belief with regard to the facts. State *v.* Nash, 88 N. C. 618. The facts were as the defendant believed them to be.[1] *Exceptions sustained.*

COMMONWEALTH *v.* COLLBERG,

119 Mass. 350 [1875].

Two indictments: one for an assault and battery by Benjamin F. Collberg upon Charles E. Phenix; and the other for an assault and battery by Phenix upon Collberg. Both indictments were founded upon and supported by the same evidence.

At the trial of the two indictments in the Superior Court before Lord, J., there was evidence for the Commonwealth tending to show that about six o'clock on the evening of Sunday, August 22, 1875, Collberg and Phenix met near the station of the Boston and Maine Railroad in Malden and had a slight altercation, as a result of which Collberg bantered Phenix to fight him; that Phenix declined on the ground that he did not want to fight with his best clothes on, but said that if Collberg would wait until he could go home and change his clothes, they would go to some place outside of the town and settle it; that thereupon Phenix did go home and change his clothes, and he and

[1] [See Commonwealth *v.* Kennard, 8 Pick. 133.]

Collberg met at a retired place, remote from habitations and thoroughfares, and fought with each other in the presence of some fifty or seventy-five persons who had gathered there, and that the fight continued until Collberg said that he had enough, when it ceased and the parties went home; that the next day Collberg and Phenix were a good deal bruised and looked as if they had been fighting.

The defendants testified that they had been acquainted with each other for a period of five or six years, during which time they had always been on the most friendly terms and were so at the time of the act complained of, and subsequently; that during the period of their acquaintance they had engaged at various times in wrestling-matches with each other, all of which had been carried on in a friendly spirit and without engendering any ill feeling between them; that on the day mentioned in the indictment they met toward evening near the station of the Boston and Maine railroad in Malden, where they had some talk about a recent wrestling-match that had taken place in New York, and growing out of this, as to previous contests of this character which had taken place between them; that after some talk about their matches, they agreed to go then to some place where they should not disturb any one and have another trial of their agility and strength in this direction; that they shortly afterwards went to such a place and engaged in a "run and catch" wrestle with each other, without any anger or malice, or any intention to do each other bodily harm; that any injuries which they inflicted upon each other were inflicted accidentally and by mutual consent while voluntarily continuing in such contest.

There was no evidence of any uproar or outcries when the contest took place, or that any one was disturbed thereby, except that the parties were fighting in presence of a crowd of from fifty to one hundred persons who had collected together. After the evidence was all in, the defendants asked the judge to instruct the jury as follows: —

"If the jury are satisfied that whatever acts and things the defendants did to each other they did by mutual consent, and that the struggle between them was an amicable contest voluntarily continued on both sides without anger or malice, and simply for the purpose of testing their relative agility and strength, then there is no assault and battery, and the defendants must be acquitted."

The judge declined to give this instruction but instructed the jury upon this branch of the case in substance as follows: "That if the defendants were simply engaged in a wrestling-match, that being a lawful sport, they could not be convicted of an assault and battery; but if by mutual agreement between themselves, previously made, they went to a retired spot for the purpose of fighting with each other and for the purpose of doing each other physical injury by fighting, with a

view to ascertain by a trial of their skill in fighting which was the better man, and there engaged in a fight, each endeavoring to do and actually doing all the physical injury in his power to the other, and if, in such contest, each did strike the other with his fist for the purpose of injuring him, each may properly be convicted of assault and battery upon the other, although the whole was done by mutual arrangement, agreement, and consent, and without anger on the part of either against the other."

To this instruction, and to the refusal of the judge to give the instruction prayed for, the defendants alleged exceptions.

ENDICOTT, J. It appears by the bill of exceptions that the parties by mutual agreement went out to fight one another in a retired place and did fight in the presence of from fifty to one hundred persons. Both were bruised in the encounter, and the fight continued until one said that he was satisfied. There was also evidence that the parties went out to engage in and did engage in a "run and catch" wrestling-match. We are of opinion that the instructions given by the presiding judge contained a full and accurate statement of the law.

The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily strength, skill, and activity, and "to fit people for defence, public as well as personal, in time of need." Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either side, are said to be exercises of this description. Fost. C. L. 259, 260; Com. Dig. Plead. 3 m. 18. But prize-fighting, boxing-matches, and encounters of that kind serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or mutual ill will. Fost. C. L. 260; 2 Greenl. on Ev. § 85; 1 Stephens N. P. 211.

If one party license another to beat him, such license is void, because it is against the law. Matthew *v.* Ollerton, Comb. 218. In an action for assault, the defendant attempted to put in evidence that the plaintiff and he had boxed by consent, but it was held no bar to the action, for boxing was unlawful, and the consent of the parties to fight could not excuse the injury. Boulter *v.* Clark, Bull. N. P. 16. The same rule was laid down in Stout *v.* Wren, 1 Hawks (N. C.), 420, and in Bell *v.* Hansley, 3 Jones (N. C.), 131. In Adams *v.* Waggoner, 33 Ind. 531, the authorities are reviewed, and it was held that it was no bar to an action for assault that the parties fought with each other by mutual consent, but that such consent may be shown in mitigation of damages. See Logan *v.* Austin, 1 Stew. (Ala.) 476. It was said by Coleridge, J., in Regina *v.* Lewis, 1 C. & K. 419, that "no one is justified in striking another except it be in self-defence, and it ought to be known that whenever two persons go out to strike each other, and do so, each is

guilty of an assault;" and that it was immaterial who strikes the first blow. See Rex v. Perkins, 4 C. & P. 537.

Two cases only have been called to our attention where a different rule has been declared. In Champer v. State, 14 Ohio St. 437, it was held that an indictment against A. for an assault and battery on B. was not sustained by evidence that A. assaulted and beat B. in a fight at fisticuffs, by agreement between them. This is the substance of the report, and the facts are not disclosed. No reasons are given or cases cited in support of the proposition, and we cannot but regard it as opposed to the weight of authority. In State v. Beck, 1 Hill (S. C.), 363, the opinion contains statements of law in which we cannot concur.

Exceptions overruled.

CHAPTER XVII.

Criminal Homicide.

Manslaughter; Murder.

Section 1. The Act and Means of Killing.

REGINA v. TOWERS,[1]

12 Cox C. C. 530 [1874].

Wilson Towers was charged with the manslaughter of John Hetherington at Castlesowerby on the 6th of September, 1873.

The prisoner, who had been drinking on the 4th of August, went into a public-house at New Yeat near Castlesowerby kept by the mother of the deceased and there saw a girl called Fanny Glaister nursing the deceased child, who was then only about four months and a half old, having been born on the 20th of March, 1873. The prisoner, who appeared to have had some grievance against Fanny Glaister about her hitting one of his children, immediately on entering the public-house went straight up to where she was, took her by the hair of the head, and hit her. She screamed loudly, and this so frightened the infant that it became black in the face; and ever since that day up to its death it had convulsions and was ailing generally from a shock to the nervous system. The child was previously a very healthy one.

. . . . . .

Denman, J., in summing up, said it was a very unusual case, and it was very unusual indeed to find a case in which they got practically

[1] [See Regina v. Pitts, Carr. & M. 284.]

no assistance from previously decided cases. There was no offence known to our law so various in its circumstances and so various in the considerations applicable to it as that of manslaughter. It might be that in this case, unusual as it was on the principle of common law, manslaughter had been committed by the prisoner. The prisoner committed an assault on the girl, which is an unlawful act, and if that act, in their judgment, caused the death of the child, that is, that the child would not have died but for that assault, they might find the prisoner guilty of manslaughter. He called their attention to some considerations that bore some analogy to this case. This was one of the new cases to which they had to apply old principles of law. It was a great advantage that it was to be settled by a jury and not by a judge. If he were to say, as a conclusion of law, that murder could not have been caused by such an act as this, he might have been laying down a dangerous precedent for the future; for to commit a murder a man might do the very same thing this man had done. They could not commit murder upon a grown-up person by using language so strong or so violent as to cause that person to die. Therefore mere intimidation, causing a person to die from fright by working upon his fancy, was not murder. But there were cases in which intimidations had been held to be murder. If for instance four or five persons were to stand round a man and so threaten him and frighten him as to make him believe that his life was in danger, and he were to back away from them and tumble over a precipice to avoid them, then murder would have been committed. Then did or did not this principle of law apply to the case of a child of such tender years as the child in question? For the purposes of the case he would assume that it did not; for the purposes of to-day he should assume that the law about working upon people by fright did not apply to the case of a child of such tender years as this. Then arose the question, which would be for them to decide, whether this death was directly the result of the prisoner's unlawful act, whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that upon all the circumstances of the case. After referring to the supposition that the convulsions were brought on owing to the child teething he said that even though the teething might have had something to do with it, yet if the man's act brought on the convulsions or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter. If therefore the jury thought that the act of the prisoner in assaulting the girl was entirely unconnected with it, that the death was not caused by it, but by a combination of circumstances, it would be accidental death and not manslaughter.

Not guilty.

REGINA *v.* CONDE,

10 Cox C. C. 547 [1867].

JOHN GEORGE CONDE and Mary Conde were indicted for and charged, upon the coroner's inquisition, with the wilful murder of William Conde.

Ellen Riosu said: I am married and reside at 7 Emily Place in the same house as the prisoners and their deceased child. The last week in December the deceased child came into my room about half-past six in the morning. I heard a peculiar rustling noise and lighted a candle, and underneath the bed in the centre of the room the child was crouching. He looked very thin and emaciated; he was in his nightgown. He spoke to me.

Besley objected to the reception of any statement made by the child in the absence of the prisoners.

Daly proposed to use it as showing the state of health of the deceased, and referred to a ruling of Alderson, B., in Regina *v.* Johnson, 2 C. & Kir. 354.

CHANNELL, B., said he was clearly of opinion that the evidence was admissible upon the ground taken by Coleridge, J., in a similar case, that it was not so much a statement as an act. A complaint of hunger was an act; although the particulars of the statement might not be receivable, the fact of the complaint was clearly so.

The witness then continued her evidence: When I first saw the child he appeared to me to be thin and emaciated, as though suffering from want of food. He spoke very weak and low, and asked me for bread. I was confirmed in my opinion by the state of his voice. This was in the last week in December. The last time I saw the child was on the 16th of February, the night on which he died. My opinion then was that he was certainly dying from starvation, he looked so emaciated.

Cross-examined. I know that the child's father had been doing pauper's work, and getting pauper's pay for it. I believe three shillings in money and nine shillings worth of food a week. I heard Joseph Conde, the eldest boy, tell the coroner that his brother, the deceased, had more food than they had.

Jane Tucker. I live right opposite the prisoner's house on the first floor. I could see plainly into the room where they lived. I never saw the deceased eating. I have seen him standing against the wall all day; on other occasions for two or three hours at a time. When his mother went out of the room he would sit down upon something, but

as soon as he heard her coming he has jumped up and resumed his former position at the wall. He used to stand at the wall while the rest of the family had their meals. The other children were playing about with something in their hands to eat or else standing at the table with their parents. Both the parents have been sitting there, and I have never seen any food given to the deceased. I have observed this for nine months, as near as I can recollect.

Mary Voller (residing at the house where the deceased died) said: The deceased looked very delicate. He asked me for bread and water three times and I gave it to him; he ate it very ravenously. On the Saturday after last Good Friday I saw the child beaten very severely three times with a cane by his mother. I have heard a child beaten every day, and sometimes two or three times a day for a long time, eight or ten months. The child cried loudly, and the cries appeared to come from the prisoners' room.

Caroline Jane Brabham said: I used about five years ago to live opposite to the prisoner. My attention was called to the house by one of the windows having either boards or shutters up. I have seen the deceased there constantly. He looked very frightened and seemed quite wild. I saw him standing there day after day with no food given to him. I have seen Mrs. Conde fetch a pint of beer daily and bread and cheese and give it to her own two children, and she would keep them at the window. They were never allowed to move or play with the other child, but were kept quite separate. The child used to stand with his hand behind him and his back against the wall from morning till it was dark at night, not in the corner but behind where the door opened. I saw him once go round to where his mother was. She struck him a heavy blow in the face, which nearly knocked him down. His father was in the room at the time but did not take the slightest notice.

There was other evidence of a similar nature.

George Charles Kernott, licentiate of the Apothecaries' Company, proved that the deceased died from starvation, death no doubt having been accelerated by beatings.

Daly stated that the male prisoner had made a statement before the coroner, which he could not put in on the part of the prosecution, as it had not been made after the requisite caution by a magistrate; but at the request of *Besley*, the counsel for the prisoner, he consented to its being read, which was accordingly done.

CHANNELL, B., in summing up the case to the jury directed them as follows: If the prisoners or either of them wilfully withheld necessary food from the deceased, with a wilful determination by withholding sustenance which was requisite to cause his death, then the party

so withholding such food is guilty of murder. If however the prisoners had the means to supply necessaries, the want of which had led to the death of the deceased, and having the means to supply such necessaries, negligently though not wilfully withheld food which if administered would have sustained life, and so caused the death of the deceased, then that would amount to the crime of manslaughter in the person so withholding the food.[1]

Mary Conde guilty of manslaughter,
John George Conde not guilty.

REGINA v. McDANIEL,

LEACH C. C. 52 [1754].

AT the Old Bailey, January Session, 1754, one Joshua Kidden was tried before Mr. Justice Foster, for robbing Mary Jones, widow, on the highway of one guinea, a half crown, and two shillings and sixpence. The prosecutrix swore very positively to the person of the prisoner and to the circumstances of the robbery, in which she was confirmed by one Berry. The prisoner, on the evidence of these two witnesses, was convicted and executed; and on the first of March following the reward of forty pounds, given by 4 & 5 Will. and Mary, c. 8, to those who shall convict a highway robber, was divided between the prosecutrix, Mary Jones, John Berry, Stephen Macdaniel, and Thomas Cooper. The history of this prosecution lay concealed in the minds of its fabricators until the 9th of August, 1754, when the high constable of the hundred of Blackheath having taken up one Blee on suspicion of being a thief, it was discovered to have been a conspiracy and contrivance to obtain the reward.

Diligent search was accordingly made to apprehend the miscreants concerned in this extraordinary transaction; and at the Old Bailey in June Session, 1756, Stephen Macdaniel, John Berry, and Mary Jones were indicted before Mr. Justice Foster, present Mr. Baron Smythe, for the wilful murder of Joshua Kidden, in maliciously causing him to be unjustly apprehended, falsely accused, tried, convicted, and executed, well knowing him to be innocent of the fact laid to his charge, with an intent to share to themselves the reward, etc. The prisoners were convicted upon the clearest and most satisfactory evidence of the fact, and a scene of depravity was disclosed as horrid as it was unexampled. The judgment, however, was respited, upon a doubt whether an indictment for murder would lie in this case. The special circum-

[1] [See Regina v. Nicholls, 13 Cox C. C. 75.]

stances were accordingly entered upon the record, together with an additional finding of the jury, "That Justice Hall, in the Old Bailey, is situated within the county of the city of London; and that felonies committed in the County of Middlesex have from time immemorial been accustomed to be tried there," in order that the point of law might be more fully considered upon motion in arrest of judgment. But Sir Robert Henley, the Attorney-General, declined to argue it, and the prisoners were at a subsequent session discharged from that indictment.

Sir William Blackstone, however, says that there were grounds to believe it was not given up from any apprehension that the point was not maintainable but from other prudential reasons.

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Section 2. Co-operating Causes.

COMMONWEALTH *v.* HACKETT,

2 Allen (Mass.) 136 [1861].

Indictment for the murder of Henry Gillen.

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The defendant contended that there was evidence to show that the wounds of the deceased were unskilfully and improperly treated by the surgeons who attended him and requested the Court to instruct the jury as follows: "1. The rule that the death must happen within a year and a day is one of limitation only, and does not change the burden of proof, or release the government from the duty of proving affirmatively that the deceased died of the wounds alleged in the indictment. 2. It is not enough to satisfy this burden for the government to prove that without the wounds the deceased would not have died. 3. If the death was caused by the improper applications or improper acts of the surgeons in dressing the wounds, the case of the government is not made out."

The Court instructed the jury in conformity with the first clause of the instructions asked for but declined to give the others, and in place thereof instructed them, substantially, that the burden of proof was upon the government to prove beyond a reasonable doubt that the deceased died of the wounds inflicted by the defendant, but that this general rule required explanation in its application to certain aspects of the present case; that a person who has inflicted a dangerous wound with a deadly weapon upon the person of another can-

not escape punishment by proving that the wound was aggravated by improper applications or unskilful treatment by surgeons; that if, in the present case, they were satisfied that the wounds inflicted by the defendant were improperly and unskilfully treated by the surgeons in attendance, and that such treatment hastened or contributed to the death of the deceased, the defendant was not for this reason entitled to an acquittal; but that the rule of law was that, if they were satisfied beyond a reasonable doubt that the defendant inflicted on the deceased dangerous wounds with a deadly weapon, and that these wounds were unskilfully treated, so that gangrene and fever ensued, and the deceased died from the wounds combined with the maltreatment, the defendant was guilty of murder or manslaughter, according as the evidence proved the one or the other; that, if they were satisfied not only that death would not have ensued but for the wounds, but also that the wounds were, when inflicted, dangerous, the defendant would be responsible, although improper and unskilful treatment might have contributed to the death; that the law does not permit a person who has used a deadly weapon and with it inflicted a dangerous wound upon another, to attempt to apportion his own wrongful and wicked act and divide the responsibility of it, by speculating upon the question of the extent to which unskilful treatment by a surgeon has contributed to the death of the person injured; but if they were in doubt whether the wounds were dangerous, or caused or contributed to the death, or whether the deceased might not have died from the unskilful treatment alone, then the defendant would be entitled to an acquittal.

The defendant was found guilty of manslaughter and alleged exceptions.

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Bigelow, C. J. . . . We have looked with care into the authorities which bear on the correctness of the instructions given to the jury, relating to the unskilful or improper treatment of the wounds alleged to have been inflicted by the prisoner upon the body of the deceased. We find them to be clear and uniform from the earliest to the latest decisions. In one of the first reported cases it is said that "though a wound may be cured, yet if the party dieth thereof," it is murder. The King *v.* Reading, 1 Keb. 17. The same principle is stated in 1 Hale, P. C. 428, thus: "If a man give another a stroke which it may be is not in itself so mortal but that with good care he might be cured, yet if he die of this wound within a year and a day, it is homicide or murder, as the case is, and so it has been always ruled. . . . If a man receives a wound which is not in itself mortal, but either for want of helpful applications or neglect thereof it turns to a gangrene or a fever, and that gan-

grene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound, for that wound, though it were not the immediate cause of death, yet if it were the mediate cause thereof and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*." In Rew's Case, as stated in 1 East P. C., c. 5, § 113, it was determined that "though the stroke were not so mortal in itself but that with good care and under favorable circumstances the party might have recovered, yet if it were such from whence danger might ensue, and the party neglected it or applied inefficacious medicines, whereby the wound which at first was not mortal in itself turned to a gangrene or produced a fever, whereof he died, the party striking shall answer for it, being the mediate cause of the death." J. Kel. 26. So in a more recent case, the jury were instructed that if the defendant wilfully and without justifiable cause inflicted a wound, which was ultimately the cause of death, it made no difference whether the wound was in its nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment. The real question is, Was the wound the cause of death? Regina v. Holland, 2 M. & Rob. 351. From these and other authorities, the well established rule of the common law would seem to be that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offence of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. 1 Russell on Crimes (7th Amer. ed.), 505; Roscoe's Crim. Ev. (3d ed.) 703, 706; 3 Greenl. Ev. § 139; Commonwealth *v.* Green, 1 Ashm. 289; Regina *v.* Haines, 2 Car. & Kirw. 368; State *v.* Baker, 1 Jones Law R. (N. C.) 267; Commonwealth *v.* M'Pike, 3 Cush. 184. The principle on which this rule is founded is one of universal application and lies at the foundation of all our criminal jurisprudence. It is that every person is to be held to contemplate and to be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes co-operated in producing the fatal result. Indeed it may be said that neglect of the wound or its unskilful and improper treatment, which were of them-

selves consequences of the criminal act which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible. But however this may be, it is certain that the rule of law, as stated in the authorities above cited, has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime and to take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men and the uncertainties attendant on the treatment of bodily ailments and injuries, it would be easy in many cases of homicide to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crime might escape conviction and punishment.

The instructions to the jury at the trial of this case were in strict conformity with the rule of law as it has always been understood and administered. Indeed the learned counsel does not attempt to show that it has ever been held otherwise. His argument on this point is confined to the signification which he attributes to the word "maltreatment." This he assumes to be either wilful ill-treatment, involving bad faith, of the wound of the deceased, or such gross carelessness in its management by the surgeons as would amount to criminality. But such is not its true meaning. Maltreatment may result either from ignorance, neglect, or wilfulness. It is synonymous with bad treatment, and does not imply, necessarily, that the conduct of the surgeons, in their treatment of the wounds of the deceased, was either wilfully or grossly careless. Nor was it used in any such narrow or restricted sense in the instructions given to the jury. On the contrary, in the connection in which it stands, it signifies only improper or unskilful treatment, and was intended to apply to the evidence as it was developed at the trial, and to meet the specific prayer for instruction on this point, which was submitted in behalf of the prisoner. There is nothing in the exceptions which shows that there was any evidence of gross carelessness or wilful mismanagement on the part of the surgeons; nor was any such suggestion made at the trial. The statement in the exceptions is that "the defendant contended that there was evidence to show that the wounds of the deceased were unskilfully and improperly treated by the surgeons who attended him," and the instructions asked for by the learned counsel refer only to improper applications and improper acts of the surgeons, and contain no intimation of any defence founded on alleged bad faith or criminal neglect in the treatment of the wounds inflicted by the prisoner on the body of the deceased. The distinction now suggested between maltreatment occasioned by such causes and that arising from a want of due care and skill (if well founded, on

which point we express no opinion) was not raised at the trial and cannot be the foundation for setting aside the verdict.

Exceptions overruled.[1]

CHAPTER XVIII.

CRIMINAL HOMICIDE.

MANSLAUGHTER.

SECTION 1. — UNDESIGNED KILLING.

REGINA *v.* CHAMBERLAIN,

10 Cox C. C. 486 [1867].

INDICTMENT for manslaughter.

The prisoner had resided for many years in Hertford, carrying on the business of a herbalist, and he was also what was called a "quack doctor." The deceased woman had for some years a tumor on her shoulder, and in March, 1866, she consulted the prisoner, who gave her first a mercurial ointment, to which no objection was taken. After this, however, it was said he gave her a different ointment, which was arsenical, and this it was suggested had caused her death by being absorbed into the system. The case for the prosecution was that she became worse after she used this ointment, — that is to say, in August, 1866; that she suffered from arsenical symptoms; and that her death, which happened in September, was owing to this cause. It was not disputed that she died with the symptoms of arsenic, nor that there was arsenic in the ointment she used; the real question in the case was whether there was "culpable negligence" on the part of the prisoner in giving it without due precautions. That being the question in the case, it turned a good deal upon the medical evidence as to the use of arsenic in ointments. As to this Dr. Taylor admitted that it was used upon the Continent, and that it had been used in this country until within the last thirty years, when he said it was discovered that it was absorbed into the system, and it was discontinued in this country, though it still was used upon the Continent. The foreign practitioners, he said, were a little more given to a bold system in cases apparently hopeless and a little more disposed to what he called "heroic" treatment — that is to say, treatment in which the medical practitioner for the sake of

[1] [See Regina *v.* Davis, 15 Cox C. C. 174; Regina *v.* Holland, 2 M. & Rob. 351.]

the patient runs some risk — than our English practitioners, who, he intimated, were rather more cautious in such cases. Another point on which the case turned was as to the prisoner not having warned the deceased of the necessary effect of the arsenic when absorbed into the system. It did not appear that he had given any particular directions beyond telling her to "rub some of the ointment in;" and the woman, naturally thinking that the more she rubbed the better, had rubbed and rubbed until she had absorbed so much of the poison that she died; and the prisoner had sold her another box without, as it appeared, making any observation as to the effect of the first.

Parry, Serjt., for the prisoner, contended that it was a case of a mere blunder or error, and not a case of negligence so culpable as to be criminal.

BLACKBURN, J., to the jury. If the prisoner by culpable negligence had caused the death of the deceased woman, he was guilty of manslaughter; but the mere fact that death had occurred through mistake or misfortune would not be enough, or no medical man would be safe. There must, however, be competent knowledge and care in dealing with a dangerous drug, and if the man either was ignorant of the nature of the drug he used or was guilty of gross want of care in its use, there would be criminal culpability. In the one case there would be culpable rashness in using so dangerous a drug in ignorance of its operation; in the other case there would be culpable want of care or culpable carelessness in the use of the drug; and in either case that would be culpable and criminal negligence, which would justify a conviction, supposing the jury were satisfied that the death arose from the arsenic. The first question was, whether the death was caused by the arsenic administered by the prisoner; upon which, however, he thought the evidence very strong. The real question would be whether there was culpable negligence, which resolved itself into the two questions he had explained. He could not define the nature of "culpable negligence" otherwise than as he had described it. It was a question for the jury, for it was a question of degree. It was a question of more or less, and it could not be defined. All the direction he could give them was that if the prisoner administered the arsenic without knowing or taking the pains to find out what its effect would be, or if knowing this, he gave it to the patient to be used without giving her adequate directions as to its use, there would in either view of the case be culpable negligence, and the prisoner ought to be convicted; but if otherwise, there would not be such negligence, and the prisoner ought to be acquitted. The most serious part of the case was in the apparent absence of caution or directions to the woman as to the use of the arsenical ointment, the effect of which, as was well known, was that it would be absorbed into the system

so as to cause death. It was said that foreign doctors used it, but if so it might be presumed that they watched its use with care. It appeared to him that a medical man who should administer such a drug or allow a patient to apply it without taking any care to observe its effects or guard against them, would be gravely wanting in due care. Whether under the circumstances it amounted to culpable negligence was, he repeated, for the jury. *Not guilty.*

REGINA *v.* DOWNES,

1 Q. B. D. 28, ABOVE, p. 102.

REGINA *v.* FRANKLIN,

15 Cox C. C. 163, ABOVE, p. 105.

REGINA *v.* HUGHES,

7 Cox C. C. 301, ABOVE, p. 114.

SECTION 2. — INTENTIONAL KILLING, BUT WITH QUALIFYING CIRCUMSTANCES.

REX *v.* THOMPSON,

1 MOODY C. C. 80 [1825].

THE prisoner was tried before Mr. Baron Garrow at the Winter Assizes at Maidstone, in the year 1825, upon an indictment which charged him, first, with maliciously stabbing and cutting Richard Southerden, with intent to murder; secondly, with intent to disable him; and thirdly, with intent to do him some grievous bodily harm.

On the trial it appeared that the prisoner, who was a journeyman shoemaker, on the 18th of November, 1824, applied to his master for some money, who refused to give it to him till he finished his work; on his subsequently urging for money and his master refusing him, he became abusive, upon which his master threatened to send for a constable. The prisoner refused to finish his work and said he would go upstairs and pack up his tools, and said no constable should stop him; he came downstairs with his tools, and drew from the sleeve of his coat a naked knife, and said, he would do for the first bloody constable that offered to stop him; that he was ready to die, and would have a life before he lost his own, and then making a twisting or flourishing motion with the knife, put it up his sleeve again, and left the shop.

The master then applied to Southerden, the constable, to take the prisoner into custody; he made no charge, but said he suspected he

had tools of his, and was leaving his work undone; the constable said he would take him if the master would give him charge of him; they then followed the prisoner to the yard of the Bull's Head Inn; the prisoner was in a public privy there as if he had occasion there. The privy had no door to it. The master said, "That is the man; I give you in charge of him." The constable then said to the prisoner, "My good fellow, your master gives me charge of you; you must go with me." The prisoner, without saying anything, presented a knife to the constable and stabbed him under the left breast; he attempted to make a second, third, and fourth blow, which the constable parried off with his staff. The constable then aimed a blow at his head; the prisoner then ran away with the knife and was afterwards secured.

The surgeon described the wound as being two inches and a half in length and one quarter of an inch deep, and inflicted with a sharp instrument like the knife produced. The knife appeared to have struck against one of the ribs and glanced off. Had the point of the knife insinuated itself between the ribs and entered the cavity of the chest, death would have inevitably been the consequence; if it had struck two inches lower death would have ensued; but the wound, as it happened, was not considered dangerous.

The jury found the prisoner guilty, and sentence of death was passed upon him; but the learned judge respited the execution and submitted the case for the consideration of the judges.

In Hilary term, 1825, all the Judges (except Best, L. C. J., and Alexander, L. C. B., who were absent), met and considered this case. The majority of the Judges, viz., Abbott, L. C. J., Graham, B., Bayley, J., Park, J., Garrow, B., Hullock, B., Littledale, J., and Gaselee, J., held that as the actual arrest would have been illegal, the attempt to make it when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation, as if death had ensued would have made the case manslaughter only, and that therefore the conviction was wrong. Holroyd, J., and Burrough, J., thought otherwise.

CHAPTER XIX.

Criminal Homicide.

Murder.

Section 1. Malice aforethought; Intention to kill, but Failure of specific Intention.

SAUNDERS' CASE,

2 Plowd. 473 (14 Eliz.).

. . . . . .

It appears by the Record that *John Saunders*, late of *Greneborough*, in the County of *Warwick*, Husbandman, and *Alexander Archer*, late of *Framton*, in the said County, Yeoman, were arraigned before the Justices upon an Indictment, for that the aforesaid *John Saunders*, the 20th Day of *September*, in the 14th Year of the Reign of the present Queen, with Force and Arms, *&c.* at *Greneborough*, in the County aforesaid, being seduced by the Instigation of the Devil, feloniously gave and ministered to one *Eleanor Saunders*, his Daughter, two Pieces of a roasted Apple mixed with Poison, called *Arsenick* and *Roseacre*, with an Intent that she might die by the Operation of the same Poison; which said *Eleanor*, after the Receipt of the same Pieces of Apple so mixed with Poison aforesaid into her Body, languished of the Poison and the Operation thereof from the aforesaid 20th Day of *September*, in the said 14th Year, unto the 22d Day of *September* then next following, on which said 22d Day of *September* she died of the Poison aforesaid: And that the aforesaid *Alexander Archer* before the Murder aforesaid by the said *John Saunders* in Form aforesaid perpetrated, *viz.* the 16th Day of *September* in the said 14th Year, at *Greneborough* aforesaid, feloniously procured and advised the said *John Saunders* to do and perpetrate the Murder aforesaid, against the Peace, *&c.* And upon their Arraignment they pleaded, not guilty, and a Jury was empanelled to try them. And upon their Examinations and the Evidence given (as I was credibly informed, for I was not present, and therefore what I here report is upon the Relation of the said Justices of Assize, and of the Clerk of Assize) the Truth of the Matter appeared to the Justices to be thus. The said *John Saunders* had a Wife whom he intended to kill, in order that he might marry another Woman with whom he was in Love, and he opened his Design to the said *Alexander Archer*, and

desired his Assistance and Advice in the Execution of it, who advised him to put an End to her Life by Poison. With this Intent the said *Archer* bought the Poison, viz. *Arsenick* and *Roseacre*, and delivered it to the said *John Saunders* to give it to his Wife, who accordingly gave it to her, being sick, in a roasted Apple, and she ate a small Part of it, and gave the rest to the said *Eleanor Saunders*, an Infant, about three Years of Age, who was the Daughter of her and the said *John Saunders* her Husband. And the said *John Saunders* seeing it, blamed his Wife for it, and said that Apples were not good for such Infants; to which his Wife replied that they were better for such Infants than for herself: and the Daughter eat the poisoned Apple, and the said *John Saunders*, her Father, saw her eat it, and did not offer to take it from her, lest he should be suspected, and afterwards the Wife recovered, and the Daughter died of the said Poison.

And whether or no this was Murder in *John Saunders*, the Father, was somewhat doubted, for he had no Intent to poison his Daughter, nor had he any Malice against her, but on the contrary he had a great Affection for her, and he did not give her the Poison, but his Wife ignorantly gave it her, and although he might have taken it from the Daughter, and so have preserved her Life, yet the not taking it from her did not make it Felony, for it was all one whether he had been present or absent, as to this Point, inasmuch as he had no Malice against the Daughter, nor any Inclination to do her any Harm. But at last the said Justices, upon Consideration of the Matters, and with the Assent of *Saunders*, Chief Baron, who had the Examination of the said *John Saunders* before, and who had signified his Opinion to the said Justices (as he afterwards said to me) were of Opinion that the said Offence was Murder in the said *John Saunders*. And the Reason thereof (as the said Justices and the Chief Baron told me) was because the said *John Saunders* gave the Poison with an Intent to kill a Person, and in the giving of it he intended that Death should follow. And when Death followed from his Act, although it happened in another Person than her whose Death he directly meditated, yet it shall be Murder in him, for he was the original Cause of the Death, and if such Death should not be punished in him, it would go unpunished; for here the Wife, who gave the poisoned Apple to her Daughter, cannot be guilty of any Offence, because she was ignorant of any Poison contained in it, and she innocently gave it to the Infant by Way of necessary Food, and therefore it is reasonable to adjudge her innocent in this Case, and to charge the Death of the Infant, by which the Queen has lost a Subject, upon him who was the Cause of it, and who intended Death in the Act which occasioned the Death here. But if a Man prepares Poison, and lays it in several Parts of

his House, with an Intent to kill Rats and such Sort of Vermin, and a Person comes and eats it, and dies of it, this is not Felony in him who prepared and laid it there, because he had no Intent to kill any reasonable Creature. But when he lays the Poison with an Intent to kill some reasonable Creature, and another reasonable Creature, whom he does not intend to kill, is poisoned by it, such Death shall not be dispunishable, but he who prepared the Poison shall be punished for it, because his Intent was evil. And therefore it is every Man's Business, to foresee what Wrong or Mischief may happen from that which he does with an ill Intention, and it shall be no Excuse for him to say that he intended to kill another, and not the Person killed. For if a Man of Malice prepense shoots an Arrow at another with an Intent to kill him, and a Person to whom he bore no Malice is killed by it, this shall be Murder in him, for when he shot the Arrow he intended to kill, and inasmuch as he directed his Instrument of Death at one, and thereby has killed another, it shall be the same Offence in him as if he had killed the Person he aimed at, for the End of the Act shall be construed by the Beginning of it, and the last Part shall taste of the first, and as the Beginning of the Act had Malice prepense in it, and consequently imported Murder, so the End of the Act, *viz.* the killing of another, shall be in the same Degree, and therefore it shall be Murder, and not Homicide only. For if one lies in wait in a certain Place to kill a Person, and another comes by the Place, and he who lies in wait kills him out of Mistake, thinking that he is the very Person whom he waited for, this Offence is Murder in him, and not Homicide only, for the killing was founded upon Malice prepense. So in the principal Case, when *John Saunders* of Malice prepense gave to his Wife the Instrument of Death, *viz.* the poisoned Apple, and this upon a subsequent Accident killed his Daughter, whom he had no Intention to kill, this is the same Offence in him as if his Act had met with the intended Effect, and his Intention in doing the Act was to commit Murder, wherefore the Event of it shall be Murder. And so the Justices declared their Opinions to the Jurors, whereupon they found both the Prisoners guilty, and *John Saunders* had his Judgment and was hanged.

But the most difficult Point in this Case, and upon which the Justices conceived greater Doubt than upon the Offence of the Principal, was, whether or no *Archer* should be adjudged Accessary to the Murder. For the Offence which *Archer* committed was the Aid and Advice which he gave to *Saunders*, and that was only to kill his Wife, and no other, for there was no parol Communication between them concerning the Daughter, and although by the Consequences which followed from the giving of the Poison by *Saunders* the Principal, it so happened

that the Daughter was killed, yet *Archer* did not precisely procure her Death, nor advise him to kill her, and therefore whether or no he should be Accessary to this Murder which happened by a Thing consequential to the first Act, seemed to them to be doubtful. For which Reason they thought proper to advise and consider of it until the next Gaol Delivery, and in the mean time to consult with the Justices in the Term. And thereupon it was entered thus in the Record, viz. *And because the aforesaid Justices here will advise themselves of and upon the Premisses, before they give Judgment thereon against the aforesaid* Alexander, *Day is given to the aforesaid* Alexander *here until next*, &c. *And in the mean time he is sent back to the Gaol aforesaid, in the Custody of the Sheriff of the County aforesaid, there to tarry and be safely kept until next*, &c. *on the Peril that shall fall thereon*, &c. And at the next Gaol-delivery the Matter was respited until the next afterwards, and so from Session to Session until this present Term of *St. Hillary, Anno* 1575, at which Time, upon Conference before had with the Justices of both Benches, they were agreed that they ought not to give Judgment against the said *Alexander Archer*, because they took the Law to be that he could not be adjudged Accessary to the said Offence of Murder, for that he did not assent that the Daughter should be poisoned, but only that the Wife should be poisoned, which Assent cannot be drawn further than he gave it, for the poisoning of the Daughter is a distinct Thing from that to which he was privy, and therefore he shall not be adjudged Accessary to it; and so they were resolved before this Time. And although they were so agreed, yet, rather than make a Precedent of it, they reprieved him from one Session to another for divers Sessions, to the Intent that he might purchase his Pardon, and by that Means be set at Liberty. And this the Lord *Dyer* told me, to whom I shewed this Report this present *Hillary* Term, *Anno* 18 *Eliz.* and he approved of it, as did also Serjeant *Barham*, to whom I shewed it.

Note, it seems to me reasonable that he who advises or commands an unlawful Thing to be done shall be adjudged Accessary to all that follows from that same Thing, but not from any other distinct Thing. As if I command a Man to rob such a one, and he attempts to rob him, and the other defends himself, and a Combat ensues between them, and the Person attempted to be robbed is killed, I shall be Accessary to this Murder, because when he attempted to rob him, he pursued my Command, and then when he pursued my Command, and in the Execution thereof another Thing happened, I ought in Reason to be deemed a Party therein, because my Command was the Cause of it. So if I command one to beat another, and he beats him so that he dies thereof,

I shall be Accessary to this Murder, for it is a Consequence of my Command, which was the original Foundation thereof, and which naturally tended to endanger the Life of the other. So if I command one to burn the House of J. S. feloniously in the Night, and he does so, and the Fire thereof burns another House, I shall be Accessary to the burning of the other House, so that although I am afterwards pardoned for being Accessary to the burning of the House of J. S. yet I shall be hanged for the burning of the other House, for inasmuch as the burning of the second House followed from my Command, and I am clearly Accessary to the burning of the first House, I ought also in Reason to be adjudged Accessary to all that followed from the burning of the first House. But if I command him to burn the House of such a one, whom he well knows, and he burns the House of another, there I shall not be Accessary to this, because it is another distinct Thing, to which I gave no Assent nor Command, but wholly different from my Command. As if I command one to steal a Horse, and he steals an Ox, or if I command him to steal a white Horse, and he steals a yellow Horse, this differs directly from my Command, and my Consent cannot be carried over to it, for there is not the least Connection or Affinity between this Act and my Command. And so if I command a Person to rob such a Goldsmith of his Plate in such a Place as he is going to *Sturbridge*-fair, and he breaks open his House in *Cheapside*, and steals his Plate from thence, I shall not be Accessary to this Burglary, because it is a Felony of another Kind from that which I commanded. But if I command one to kill another by Poison, and he kills him with a Sword, or if I command one to kill another in the Fields, and he kills him in the City or Church, or if I command him to kill him such a Day and he kills him at another Day, there I shall be Accessary to such Murder, because the Death is the principal Matter, which has followed from my Command, and the Place, Instrument, Time, and the like, are but the Manner and Form how the Death of the Party shall be effected, and not the Substance of the Matter, and a Variance in the formal Part of the Execution of the Command shall not discharge a Man from being Accessary. But yet in some Cases the Time may be material; for if I command one to kill J. S. and before the Fact done I go to him and tell him that I have repented, and expressly charge him not to kill J. S. and he afterwards kills him, there I shall not be Accessary to this Murder, because I have countermanded my first Command, which in all Reason shall discharge me, for the malicious Mind of the Accessary ought to continue to do ill until the Time of the Act done, or else he shall not be charged; but if he had killed J. S. before the Time of my Discharge or Countermand given, I should have been Accessary to the Death, notwithstanding my pri-

vate Repentance. And in an Appeal lately brought by the Wife of *Cholmley* against one *Nicholas*, who had assaulted her Husband in the County of *Wilts*, with an Intent to rob him, and had killed him with a Gun, and afterwards obtained the Queen's Charter of Pardon, this Question was put by an Apprentice of the Middle Temple to *Catline*, Chief Justice of *England*, and to his Companions in the King's Bench, whether or no those who had received *Nicholas*, and had given him Meat and Drink, after the Charter of Pardon, knowing of the Murder and the Pardon, should be accounted Accessaries, with respect to the Appeal brought by the Wife: To which *Catline* answered that they should, for although the Queen had granted her Pardon to *Nicholas*, whereby he was in Fact discharged of the Felony against the Queen, yet he remained a Felon as to the Wife, and by the same Reason those who received him shall be Accessaries as to the Wife, for the Pardon could not discharge the Accessaries any more than the Principal, against the Wife: But *Popham* was of the contrary Opinion, and said that this could not be, because there can be no Accessary without an Offence to the Crown; for an Appeal as well as an Indictment says, that they received him "against the Crown and Dignity of the Lady the Queen." And then if there was no Offence to the Crown at the Time of the Receipt, the Receipt cannot be Felony, but as to the principal Fact, it was an Offence as well to the Crown as to the Wife at the Time of the Act perpetrated, and therefore although the Queen has pardoned the principal Felon, yet the Wife may truly say, as to him, that the Act was against the Queen's Crown and Dignity, but not as to those who received the Principal afterwards, because at the Time of the Receipt there was no Offence continuing in the Principal against the Crown; *ad quod non fuit responsum.* But the Receipt of the Felon before the Pardon was Felony. So that in Cases of Accessary the Time is to be considered, if so be that any Thing material happens intermediately, but otherwise the Day or Time when the Accessary commits the Offence is not more material than the Place where, or the Instrument with which, it is done.

But I greatly approve of the said Opinions of the Justices concerning the Accessary in the Case before reported, because the poisoning of the Daughter was a distinct act, to which *Archer* gave no Advice nor Counsel, and whose Death he did not procure.

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AGNES GORE'S CASE.

9 Co. 81, a.

Before Fleming, Chief Justice, and Tanfield, Chief Baron, Justices of Assise, this case happened in their western circuit. Agnes, the daughter of Roper, married one Gore; Gore fell sick; Roper, the father, in good will to the said Gore his son-in-law went to one Dr. Gray, a physician, for his advice, who made a receipt directed to one Martin, his apothecary, for an electuary to be made, which the said Martin did and sent it to the said Gore; Agnes, the wife of Gore, secretly mixed ratsbane with the electuary, to the intent therewith to poison her husband, and afterward, 18 *Maii*, she gave part of it to her husband, who eat thereof and immediately became grievously sick; the same day Roper the father eat of it, and immediately also became sick; 19 *Maii* C. eat part of it, and he likewise fell sick; but they all recovered and yet are alive. The said Roper, observing the operation of the said electuary, carried the said box with the said electuary 21 *Maii* to the said Gray the physician and informed him of the said accidents, who sent for the said Martin the apothecary and asked him if he had made the said electuary according to his direction, who answered that he had in all things but in one, which he had not in his shop, but put in another thing of the same operation, which the said Dr. Gray well approved of; whereupon Martin the apothecary said, "To the end you may know that I have not put anything in it which I myself will not eat, I will here before you eat part of it," and thereupon Martin took the box, and with his knife mingled and stirred together the said electuary, and took and eat part of it, of which he died the 22d day of May following. The question was, if upon all this matter Agnes had committed murder. And this case was delivered in writing to all the judges of England to have their opinions in the case; and the doubt was, because Martin himself of his own head, without incitation or procurement of any, not only eat of the said electuary, but he himself mingled and stirred it together, which mixing and stirring had so incorporated the poison with the electuary, that it made the operation more forcible than the mixture which the said Agnes had made; for notwithstanding the mixture which Agnes had made, those who eat of it were sick, but yet alive, but the mixture which Martin has made by mingling and stirring of it with his knife, made the operation of the poison more forcible and was the occasion of his death. And if this circumstance would make a difference between this case and Saunders's case in Plow. Com. 474 was the question.

And it was resolved by all the judges that the said Agnes was guilty of the murder of the said Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband with the event which thence ensued, — *sc.* the death of the said Martin; for the putting of the poison into the electuary is the occasion and cause, and the poisoning and death of the said Martin is the event, *quia eventus est qui ex causâ sequitur, et dicuntur eventus quia ex causis eveniunt*, and the stirring of the electuary by Martin with his knife without the putting in of the poison by Agnes could not have been the cause of his death.

And it was also resolved, that if A. puts poison into a pot of wine, &c., to the intent to poison B., and sets it in a place where he supposes B. will come and drink of it, and by accident C. (to whom A. has no malice) comes and of his own head takes the pot and drinks of it, of which poison he dies, it is murder in A., for the law couples the event with the intention and the end with the cause; and in the same case if C. thinking that sugar is in the wine, stirs it with a knife and drinks of it, it will not alter the case; for the King by reason of the putting in of the poison with a murderous intent has lost a subject; and therefore in law he who so put in the poison with an ill and felonious intent shall answer for it. But if one prepares ratsbane to kill rats and mice, or other vermin, and leaves it in certain places to that purpose, and with no ill intent, and one finding it eats of it, it is not felony, because he who prepares the poison has no ill or felonious intent; but when one prepares poison with a felonious intent to kill any reasonable creature, whatsoever reasonable creature is thereby killed, he who has the ill and felonious intent shall be punished for it, for he is as great an offender as if his intent against the other person had taken effect. And if the law should not be such, this horrible and heinous offence would be unpunished; which would be mischievous and a great defect in the law.

SECTION 2. MURDER: MALICE AFORETHOUGHT; WRONGFUL INTENTION, BUT NO INTENTION TO KILL.

REGINA *v.* SERNÉ.

16 Cox C. C. 311 [1887].

THE prisoners Leon Serné and John Henry Goldfinch were indicted for the murder of a boy, Sjaak Serné, the son of the prisoner Leon Serné, it being alleged that they wilfully set on fire a house and shop,

No. 274 Strand, London, by which act the death of the boy had been caused.

It appeared that the prisoner Serné with his wife, two daughters, and two sons were living at the house in question; and that Serné, at the time he was living there, in midsummer, 1887, was in a state of pecuniary embarrassment and had put into the premises furniture and other goods of but very little value, which at the time of the fire were not of greater value than £30. It also appeared that previously to the fire the prisoner Serné had insured the life of the boy Sjaak Serné, who was imbecile, and on the first day of September, 1887, had insured his stock at 274 Strand, for £500, his furniture for £100, and his rent for another £100; and that on the 17th of the same month the premises were burnt down.

Evidence was given on behalf of the prosecution that fires were seen breaking out in several parts of the premises at the same time, soon after the prisoners had been seen in the shop together, two fires being in the lower part of the house and two above, on the floor whence escape could be made on to the roof of the adjoining house, and in which part were the prisoners, and the wife, and two daughters of Serné, who escaped; that on the premises were a quantity of tissue transparencies for advertising purposes, which were of a most inflammable character; and that on the site of one of the fires was found a great quantity of these transparencies close to other inflammable materials; that the prisoner Serné, his wife and daughters, were rescued from the roof of the adjoining house, the other prisoner being rescued from a window in the front of the house, but that the boys were burnt to death, the body of the one being found on the floor near the window from which the prisoner Serné, his wife, and daughters had escaped, the body of the other being found at the basement of the premises.

Stephen, J. Gentlemen, it is now my duty to direct your attention to the law and the facts into which you have to inquire. The two prisoners are indicted for the wilful murder of the boy Sjaak Serné, a lad of about fourteen years of age; and it is necessary that I should explain to you, to a certain extent, the law of England with regard to the crime of wilful murder, inasmuch as you have heard something said about constructive murder. Now that phrase, gentlemen, has no legal meaning whatever. There was wilful murder according to the plain meaning of the term or there was no murder at all in the present case. The definition of murder is unlawful homicide with malice aforethought, and the words "malice aforethought" are technical. You must not, therefore, construe them or suppose that they can be construed by ordinary rules of language. The words have to be construed according to a long

series of decided cases, which have given them meanings different from those which might be supposed. One of those meanings is, the killing of another person by an act done with an intent to commit a felony. Another meaning is, an act done with the knowledge that the act will probably cause the death of some person. Now it is such an act as the last which is alleged to have been done in this case; and if you think that either or both of these men in the dock killed this boy, either by an act done with intent to commit a felony, that is to say, the setting of the house on fire in order to cheat the insurance company, or by conduct which, to their knowledge, was likely to cause death and was therefore eminently dangerous in itself, — in either of these cases the prisoners are guilty of wilful murder in the plain meaning of the word. I will say a word or two upon one part of this definition, because it is capable of being applied very harshly in certain cases, and also because, though I take the law as I find it, I very much doubt whether the definition which I have given, although it is the common definition, is not somewhat too wide. Now when it is said that murder means killing a man by an act done in the commission of a felony, the mere words cover a case like this, that is to say, a case where a man gives another a push with an intention of stealing his watch, and the person so pushed, having a weak heart or some other internal disorder, dies. To take another very old illustration, it was said that if a man shot at a fowl with intent to steal it and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law, or whether the Court for the Consideration of Crown Cases Reserved would hold it to be so. The present case, however, is not such as I have cited, nor anything like them. In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed, while that part of the law under which the Crown in this case claim to have proved a case of murder is maintained. I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. I think that every one would say in a case like that, that when a person began doing wicked acts for his own base purposes, he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a

deadly weapon, such as a bludgeon, a pistol, or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began. That I take to be the true meaning of the law on the subject. In the present case, gentlemen, you have a man sleeping in a house with his wife, his two daughters, his two sons, and a servant, and you are asked to believe that this man, with all these people under his protection, deliberately set fire to the house in three or four different places and thereby burnt two of them to death. It is alleged that he arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was placing all those people in deadly risk. It appears to me that if that were really done, it matters very little indeed whether the prisoners hoped the people would escape or whether they did not. If a person chose, for some wicked purpose of his own, to sink a boat at sea and thereby caused the deaths of the occupants, it matters nothing whether at the time of committing the act he hoped that the people would be picked up by a passing vessel. He is as much guilty of murder, if the people are drowned, as if he had flung every person into the water with his own hand. Therefore, gentlemen, if Serné and Goldfinch set fire to this house when the family were in it, and if the boys were by that act stifled or burnt to death, then the prisoners are as much guilty of murder as if they had stabbed the children. I will also add, for my own part, that I think in so saying, the law of England lays down a rule of broad, plain common-sense. Treat a murderer how you will, award him what punishment you choose, it is your duty, gentlemen, if you think him really guilty of murder, to say so. That is the law of the land, and I have no doubt in my mind with regard to it. There was a case tried in this court which you will no doubt remember, and which will illustrate my meaning. It was the Clerkenwell explosion case in 1868, when a man named Barrett was charged with causing the death of several persons by an explosion which was intended to release one or two men from custody; and I am sure that no one can say truly that Barrett was not justly hanged. With regard to the facts in the present case, the very horror of the crime, if crime it was, the abomination of it, is a reason for your taking the most extreme care in the case, and for not imputing to the prisoners anything which is not clearly proved. God forbid that I should, by what I say, produce on your minds, even in the smallest degree, any feeling against the prisoners. You must see, gentlemen, that the evidence leaves no reasonable doubt upon your minds; but you will fail in the performance of your duty if, being satisfied with the evidence, you do not convict one or both the prisoners of wilful murder, and it is wilful murder of which they are accused. [The

learned judge then proceeded to review the evidence. In the result the jury found a verdict of not guilty in respect of each of the prisoners. *Verdict, Not Guilty.*

SECTION 3. MURDER: MALICE AFORETHOUGHT; DRUNKENNESS AS THROWING LIGHT UPON THE EXISTENCE OF MALICE.

REGINA *v.* DOHERTY,

16 Cox C. C. 306 [1887].

THE prisoner was indicted for the wilful murder of Michael Graham by shooting him with a revolver. It appeared that on the evening of Saturday, the 19th day of November, 1887, the prisoner had lost a large sum of money at baccarat to a man named Howe, which sum he was unable to pay at the time, but arranged to meet Howe on the following Monday. On Monday the prisoner and the deceased met Howe according to the appointment, when the prisoner stated that he could not pay the money he had lost. Subsequently the prisoner endeavored to raise a quarrel with Howe but was quieted by the deceased, who went with him to his lodgings at 47 Woburn Place, where he remained to dinner. A report was heard by the servant who was bringing up the dinner, then a noise as of scuffling, and then another report six or seven seconds after the first; and the prisoner's wife rushed out of the room. Upon the servant entering the room she found that the back of a chair was on fire and the deceased told her he was hit. Immediately after the occurrence the deceased said to a constable who was called in, "I am shot, it 's quite by accident; call a cab." He subsequently, however, stated in the presence of the prisoner that on the 21st day of November he was with the prisoner at the Bodega and at the Criterion when the subject of the money lost to Howe by the prisoner was mentioned, and the prisoner said he should not pay it; and that he told the prisoner that he ought to pay; that in the room at Woburn Place he had picked up a paper and sat down, and that the prisoner went into the bedroom and coming out fired two shots, one of which hit him; that he was unable to see whether the prisoner aimed at him as the paper was between them; that he told the prisoner that he had hit him, and that he sent for a cab and said it was an accident for fear the prisoner should fire again. After the deceased had made this statement the prisoner was allowed to question him and said, "Have I ever had wrong words with you before?" to which the deceased replied, "He 's quite right."

Upon the completion of the case for the prosecution Sir Charles Russell stated that the prisoner wished to make a statement to the jury.

STEPHEN, J. If the prisoner wishes to make any statement he is at liberty to do so; but it must be understood that he makes his statement before the Court is addressed by counsel on his behalf, and that though he cannot be questioned upon his statement, his making it will give the counsel for the prosecution a right to reply.

The prisoner thereupon made a statement to the jury, upon the conclusion of which *Sir Charles Russell* . . . addressed the Court on his behalf.

STEPHEN, J. It is my duty first, gentlemen, to lay down the law for your instruction with regard to what constitutes the crime of murder. Murder is unlawful homicide with malice aforethought. Manslaughter is unlawful homicide without malice aforethought. First, as to the term "aforethought;" its meaning has been laid down clearly by HOLT, C. J., who in Regina *v.* Mawgridge, Kelyng, 174, says: "He that doth a cruel act voluntarily doth it of malice prepensed," which is the same as aforethought. "Aforethought," therefore, does not necessarily imply premeditation, but it implies intention which must necessarily precede the act intended. What, then, is the intention necessary to constitute murder? Several intentions would have this effect; but I need mention only two in this case, namely, an intention to kill and an intention to do grievous bodily harm. If the act which caused death — the firing of the pistol — was done with either of these intentions, Doherty's crime was murder. But it is difficult to see how a man can fire a loaded pistol at another without intending to do him grievous bodily harm, so that if you think that Doherty fired the pistol at the deceased's body intending to hit him but taking his chance where he hit him, that would be murder though he did not intend to kill. If on the other hand you think that he fired it vaguely, without any special intent at all, and by so doing caused his death, that would be manslaughter. The general rule as to intention is that a man intends the natural consequences of his act. As a rule the use of a knife to stab or of a pistol to shoot shows an intention to do grievous bodily harm, but this is not a necessary inference. In drawing it you should consider for one thing the question whether the prisoner is drunk or sober. It is almost trivial for me to observe that a man is not excused from crime by reason of his drunkenness. If it were so you might as well at once shut up the criminal courts, because drink is the occasion of a large proportion of the crime which is committed; but although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in

considering whether he formed the intention necessary to constitute the crime. If a sober man takes a pistol or a knife and strikes or shoots at some one else, the inference is that he intended to strike or shoot him with the object of doing him grievous bodily harm. If, however, a man acting in that way was drunk, you have to consider the effect of his drunkenness upon his intention. In such cases a distinction of vital importance occurs to which it is necessary to point. A drunken man may form an intention to kill another or to do grievous bodily harm to him, or he may not; but if he did form that intention, although a drunken intention, he is just as much guilty of murder as if he had been sober. In a case which I tried a year or two ago a man was charged with having murdered his wife. He was a violent, brutal fellow, who came home one day very drunk and kicked his wife for several hours together until she died. He repeatedly declared that he meant to kill her. That man was properly convicted and hanged. In that case there was not only the man's conduct but also a repeated declaration that he would kill his wife, and I then said to the jury that they must consider whether he had an intention, drunken or not, to cause death or grievous bodily harm, and that if he had he was guilty of murder; but that in deciding this question the fact of his drunkenness must be taken into account. I say the same to you. If, gentlemen, you conclude that Doherty took the life of Graham by a pistol shot fired at him with intent to do grievous bodily harm, he would be guilty of murder even though he were drunk; but if his drunkenness prevented his forming such an intention, he would be guilty of manslaughter and not murder, though such an act in a sober man would prove an intention to do grievous bodily harm.

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Section 4. Murder: Statutory Degrees.

STATE v. JOHNSON,

40 Conn. 136 [1873].

Indictment for murder in the first degree; brought to the Superior Court in New Haven County, and tried, on the plea of not guilty, before Foster and Granger, J.

The murder charged was that of a woman named Johanna Hess at Meriden, in New Haven County, on the 8th day of July, 1872. By statute (Gen. Sts., tit. 12, § 6), "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in perpetrating, or attempting to perpetrate, any arson, rape,

robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty, ascertain in their verdict whether it be murder in the first degree or second degree." Another section of the statute makes murder in the first degree punishable by death and in the second degree by imprisonment in the State prison for life.

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CARPENTER, J. . . . The prisoner was indicted and on trial for murder in the first degree. As the homicide was not perpetrated by means of poison, or lying in wait, or in committing or attempting to commit any of the crimes enumerated in the statute, he could only be convicted of the higher offence by showing that it was a wilful, deliberate, and premeditated killing. A *deliberate intent* to take life is an essential element of that offence. The existence of such an intent must be shown as a fact. Implied malice is sufficient at common law to make the offence murder and under our statute to make it murder in the second degree; but to constitute murder in the first degree, actual malice must be proved. Upon this question the state of the prisoner's mind is material. In behalf of the defence, insanity, intoxication, or any other fact which tends to prove that the prisoner was incapable of deliberation, was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, not in mitigation of punishment, but as tending to show that the less and not the greater offence was in fact committed. I cite a few only of the many authorities which sustain this position. Keenan *v.* the Commonwealth, 44 Penn. S. R. 55; Roberts *v.* The People, 19 Mich. 401; Pigman *v.* The State, 14 Ohio, 555; State *v.* Garvey, 11 Minn. 154; Haile *v.* The State, 11 Humph. 154; Shannahan *v.* The Commonwealth, 8 Bush (Ky.), 463; Ray's Med. Jur. 5th ed. 566.

As I have already said, the charge of the Court was in itself well enough; but we must consider it in its application to the case on trial and in the sense in which the jury probably understood it. When they were told that "drunkenness does not excuse a party from the consequences of a criminal act," it is probable that they did not distinguish between excusing a crime and showing that the specific crime charged had not been committed; and when they were further told that "a man committing a criminal act, though intoxicated at the time, is a legal and proper subject of punishment," they undoubtedly understood the "criminal act" to mean murder in the first degree and punishment to mean capital punishment, and that the intoxication of the prisoner, whether little or much, could legally have no bearing upon the ques-

tion whether it was murder in the first or second degree. The danger is that the jury, while making up their verdict, excluded from their minds the subject of intoxication altogether; and that they were led to believe that the malice implied by law from the weapon used, and the circumstances attending the offence, was sufficient to constitute murder in the first degree, and that a deliberate, premeditated design to take life was not essential. If so, it is manifest that injustice may have been done the prisoner. I think the Court should have submitted to the consideration of the jury the fact of intoxication, if it was a fact, to be weighed by them in connection with the other evidence in the cause, in determining whether it was a wilful, deliberate, and premeditated killing.

For these reasons a majority of the Court are of the opinion that a new trial should be advised.

In this opinion PARK, J., concurred. SEYMOUR, J., dissented. FOSTER, J., having tried the case below, did not sit.

LEIGHTON *v.* PEOPLE,

88 N. Y. 117 [1882].

ERROR to the General Term of the Supreme Court in the first judicial department, to review judgment entered upon an order made May 20, 1881, which affirmed a judgment of the Court of Oyer and Terminer of the County of New York, entered upon a verdict convicting the plaintiff in error of the crime of murder in the first degree.

The material facts appear in the opinion.

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DANFORTH, J. . . . 3. At its close the prisoner's counsel "excepted to all portions of the charge in reference to the question of the time required for premeditation and deliberation." To bring the case within the statutory definition of murder in the first degree it was necessary that the crime should be "perpetrated from the deliberate and premeditated design to effect the death of the person killed." Laws of 1873, c. 644, § 5. An act co-existent with and inseparable from a sudden impulse, although premeditated, could not be deemed deliberate, as when under sudden and great provocation one instantly, although intentionally, kills another. But the statute is not satisfied unless the intention was deliberated upon. If the impulse is followed by reflection, that is deliberation; hesitation even may imply deliberation; so may threats against another and selection of means with which to perpetrate the deed. If therefore the killing is not the instant effect of impulse, if there is hesitation or doubt to be overcome, a choice made as the re-

sult of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder.

The charge upon this point was most favorable to the prisoner. After stating the statute the judge said: "There must therefore be, in order to establish the crime of murder in the first degree, deliberation and premeditation; but there is no time prescribed within which these operations of the mind must occur; it is sufficient if their exercise was accomplished when the deed was done resulting in the death." Again he said: "It is enough if there is time for the mind to think upon, to consider the act of killing, to meditate upon it, to weigh it, and then to determine to do it." Immediately after this follows that portion of the charge to which the learned counsel for the appellant directs our attention. "For example," said the judge, "if I having from any reason, it matters not what, an enmity toward another, should start from this point and walk to the corner of Chambers Street, weigh in my mind, deliberate upon, and premeditate a deadly assault upon another, and at that corner, meeting there the person toward whom my thoughts were directed, I struck the deadly blow, that would be sufficient deliberation and sufficient premeditation to perfect the crime of murder in the first degree. It is enough that the mind operates in these two respects to accomplish it and to present all the elements that are necessary to establish murder in the first degree."

In this there was no error. Then followed a statement of the evidence bearing upon the proposition just laid down. It has been recited in the learned and elaborate opinion of the Court below, its correctness has not been denied by the appellant's counsel, and it need not be repeated. It was in our opinion quite enough for submission to the jury.

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CHAPTER XX.

HOMICIDE: JUSTIFICATION.

SECTION 1. SELF DEFENCE; DEFENCE OF ANOTHER.

REGINA *v.* KNOCK,

14 Cox C. C. 1 [1877].

PRISONER was indicted for the manslaughter of Joseph Tipper.

It was proved that the prisoner, being challenged and attacked by the deceased, who had taken his coat off to fight, also took off his coat, and blows of the fists were exchanged. After four or five rounds the

deceased received from the prisoner a blow which killed him. The facts are more particularly stated in the summing up.

At the close of the case for the prosecution *Underhill* submitted that there was no evidence for the jury. The fatal blow must have been given accidentally in defence.

LINDLEY, J. The case is perhaps on the border-line. But seeing that the men fought four or five rounds there appears to have been what is called a "set-to." I think therefore that under the circumstances the facts should go to the jury.

Counsel for the prisoner having addressed the jury,

LINDLEY, J., summed up. The prisoner is charged with manslaughter, which means causing the death of another without lawful excuse. If he did so he is guilty; if he did not he is not guilty. What, then, is lawful excuse? The difficulty is in drawing the distinction between self-defence and fighting. If two men fight and one unfortunately kills another, then, they being engaged in an unlawful occupation or business, the killing of either by the other is manslaughter even if it be by accident, and is a crime in point of law although the crime varies in degree of gravity. But on the other hand if a man attacks me, I am entitled to defend myself, and the difficulty arises in drawing the line between mere self-defence and fighting. The test is this, — a man defending himself does not want to fight and defends himself solely to avoid fighting. Then supposing a man attacks me and I defend myself, not intending or desiring to fight, but still fighting — in one sense — to defend myself, and I knock him down and thereby unintentionally kill him, that killing is accidental. It is for you to draw the line. The facts up to a certain point are not disputed. No doubt the deceased came to his death in the course of a struggle with the prisoner and was knocked down by the prisoner, and by reason of being so knocked down died; *prima facie* that is unlawful killing. Next let us consider whether the men were fighting in the sense I have defined or whether the prisoner was desiring not to fight. The evidence clearly shows that it was the defendant who provoked this, and it was sworn that not only was a challenge to fight given, not only did they go out, but both had their jackets off. A fact in favor of the prisoner is that he was reluctant indoors to fight and expressed the same reluctance out of doors. But they had four or five rounds. That is a circumstance which tends to show that these persons were really fighting as distinguished from mere resistance in self-defence. If you think the prisoner was doing what was lawful, simply defending himself, find him not guilty; but if he was fighting, then he was doing what was unlawful and your verdict should be against him.

Verdict, not guilty.

REGINA *v.* ROSE,

15 Cox C. C. 540 [1884].

THE prisoner was indicted for the wilful murder of his father, John William Rose, at Witney, on the 27th day of September.

The material facts proved were as follows: The prisoner, a weakly young man of about twenty-two years of age, was at the time of the alleged murder living with his father, mother, and sisters at Witney. The father, who was a very powerful man, had recently taken to excessive drinking, and while in a state of intoxication was possessed with the idea that his wife was unfaithful to him. He had on more than one occasion threatened to take away her life, and so firmly impressed was she with the idea that these were no idle threats that the prisoner's mother had frequently concealed everything in the house which could be used as a weapon.

On the night in question the family retired to their bedrooms, which were situated adjoining to one another, about nine o'clock. The deceased man appears to have immediately commenced abusing and ill-treating his wife, accusing her of unfaithfulness to him and threatening to murder her. On several occasions she retired for safety to her daughter's room; on the last occasion her husband pursued her, and seizing her dragged her toward the top of the stairs, threatening to push her down. He then said he would cut her throat, left her saying he was going to fetch the knife, which all the family seem to have known was in his room, and then rushing back seized his wife and forced her up against the balusters, holding her in such a position that the daughters seem to have thought he was actually cutting her throat. The daughters and mother shouted "murder," and the prisoner, running out of his room, found his father and mother in the position described. No evidence was given that the deceased man had any knife in his hand, and all the witnesses said that they did not see then or afterwards find his knife.

The prisoner fired one shot (according to his own account) to frighten his father, but no trace of any bullet could be found; and immediately after he fired another shot which, striking his father in the eye, lodged in the brain and caused his death in about twelve hours. On his arrest the prisoner said, "Father was murdering Mother. I shot on one side to frighten him; he would not leave her, so I shot him."

In cross-examination the deceased man's employer said that the prisoner's father was the strongest man he had ever seen and the pris-

oner would not have had the slightest chance in a hand-to-hand encounter with him.

The defence set up was that the case was one of excusable homicide.

His LORDSHIP in the course of his summing up said: Homicide is excusable if a person takes away the life of another in defending himself, if the fatal blow which takes away life is necessary for his preservation. The law says not only in self-defence such as I have described may homicide be excusable, but also it may be excusable if the fatal blow inflicted was necessary for the preservation of life. In the case of parent and child, if the parent has reason to believe that the life of a child is in imminent danger by reason of an assault by another person and that the only possible, fair, and reasonable means of saving the child's life is by doing something which will cause the death of that person, the law excuses that act. It is the same of a child with regard to a parent; it is the same in the case of husband and wife. Therefore I propose to lay the law before you in this form: If you think, having regard to the evidence and drawing fair and proper inferences from it, that the prisoner at the bar acted without vindictive feeling toward his father when he fired the shot, if you think that at the time he fired that shot he honestly believed and had reasonable grounds for the belief that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused, and the law will excuse him from the consequences of the homicide. If however on the other hand you cannot come to that conclusion, if you think and think without any reasonable doubt that it is not a fair inference to be drawn from the evidence, but are clearly of opinion that he acted vindictively and had not such a belief as I have described to you or had not reasonable grounds for such a belief, then you must find him guilty of murder.

Verdict, not guilty.

SECTION 2. EXTREME PRESSURE OF CIRCUMSTANCES.

UNITED STATES v. HOLMES,

1 WALL. JR. 1.

REGINA v. DUDLEY,

L. R. 14 Q. B. 273; 15 Cox C. C. 624.

. . . . . .

LORD COLERIDGE, C. J. The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on

the high seas on the 25th day of July in the present year. They were tried before my brother Huddleston at Exeter on the 6th day of November, and under the direction of my learned brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment. The special verdict is as follows. [*The learned judge read the special verdict.*] From these facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation and to sufferings which might break down the bodily power of the strongest man and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned brother's notes; but nevertheless this is clear, — that the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with a certainty of depriving him of any possible chance of survival. The verdict finds in terms that "if the men had not fed upon the body of the boy, they would probably not have survived," and that "the boy, being in a much weaker condition, was likely to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, them who killed him. Under these circumstances the jury say they are ignorant whether those who killed him were guilty of murder, and have referred it to this Court to say what is the legal consequence which follows from the facts which they have found. . . . There remains to be considered the real question in the case, whether killing, under the circumstances set forth in the verdict, be or be not murder. The contention that it could be anything else was to the minds of us all both new and strange; and we stopped the Attorney-General in his negative argument that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy. All, no doubt, that can be said has been urged before us, and we are now to consider and determine what it amounts to. First, it is said that it follows, from various definitions of murder in books of authority — which definitions imply, if they do not state, the doctrine — that, in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever toward you or any one

else. But if these definitions be looked at, they will not be found to sustain the contention. The earliest in point of date is the passage cited to us from Bracton, who wrote in the reign of Henry III. It was at one time the fashion to discredit Bracton, as Mr. Reeves tells us, because he was supposed to mingle too much of the canonist and civilian with the common lawyer. There is now no such feeling; but the passage upon homicide, on which reliance is placed, is a remarkable example of the kind of writing which may explain it. Sin and crime are spoken of as apparently equally illegal; and the crime of murder, it is expressly declared, may be committed *lingua vel facto;* so that a man like Hero, "done to death by slanderous tongues," would, it seems, in the opinion of Bracton, be a person in respect of whom might be grounded a legal indictment for murder. But in the very passage as to necessity on which reliance has been placed, it is clear that Bracton is speaking of necessity in the ordinary sense, — the repelling by violence, violence justified so far as it was necessary for the object, any illegal violence used toward one's self. If, says Bracton (Lib. iii., Art. De Corona, cap. 4, fol. 120), the necessity be "evitabilis et evadere posset absque occisione, tunc erit reus homicidii," words which show clearly that he is thinking of physical danger, from which escape may be possible, and that "inevitabilis necessitas," of which he speaks as justifying homicide, is a necessity of the same nature. It is, if possible, yet clearer that the doctrine contended for receives no support from the great authority of Lord Hale. It is plain that in his view the necessity which justifies homicide is that only which has always been, and is now, considered a justification. "In all these cases of homicide by necessity," says he, "as in pursuit of a felon, in killing him that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony" (1 Hale, P. C. 491). Again, he says that the necessity which justifies homicide is of two kinds: "(1) That necessity which is of a private nature; (2) that necessity which relates to the public justice and safety. The former is that necessity which obligeth a man to his own defence and safeguard; and this takes in these inquiries: (1) What may be done for the safeguard of a man's own life," — and then follow three other heads not necessary to pursue. Then Lord Hale proceeds: "(1) As touching the first of these, namely, homicide in defence of a man's own life, which is usually styled *se defendendo*" (1 Hale, P. C. 478). It is not possible to use words more clear to show that Lord Hale regarded the private necessity which justified, and alone justified, the taking the life of another for the safeguard of one's own to be what is commonly called self-defence. But if this could be even doubtful upon Lord Hale's words, Lord Hale himself has made it clear, for in the chapter in which he

deals with the exemption created by compulsion or necessity, he thus expresses himself: "If a man be desperately assaulted and in peril of death and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder if he commit the fact, for he ought rather to die himself than to kill an innocent; but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant, for, by the violence of the assault and the offence committed upon him by the assailant himself, the law of nature and necessity hath made him his own *protector cum debito moderamine inculpatæ tutelæ*" (1 Hale, P. C. 51). But, further still: Lord Hale in the following chapter deals with the position asserted by the casuists and sanctioned, as he says, by Grotius and Puffendorf, that in a case of extreme necessity, either of hunger or clothing, "theft is no theft, or at least not punishable as theft; and some even of our own lawyers have asserted the same;" "but," says Lord Hale, "I take it that here in England that rule, at least by the laws of England, is false; and therefore if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and *animo furandi* steal another man's goods, it is a felony and a crime by the laws of England punishable with death" (1 Hale, P. C. 54). If therefore Lord Hale is clear, as he is, that extreme necessity of hunger does not justify larceny, what would he have said to the doctrine that it justified murder! It is satisfactory to find that another great authority, second probably only to Lord Hale, speaks with the same unhesitating clearness on this matter. Sir Michael Foster in the third chapter of his "Discourse on Homicide," deals with the subject of Homicide Founded in Necessity; and the whole chapter implies, and is insensible unless it does imply, that in the view of Sir Michael Foster, necessity and self-defence (which in section 1 he defines as "opposing force to force even to the death") are convertible terms. There is no hint, no trace of the doctrine now contended for; the whole reasoning of the chapter is entirely inconsistent with it. In East (1 East P. C. 271), the whole chapter on Homicide by Necessity is taken up with an elaborate discussion of the limits within which necessity — in Sir Michael Foster's sense (given above) — of self-defence is a justification of or excuse for homicide. There is a short section at the end (p. 294) very generally and very doubtfully expressed, in which the only instance discussed is the well-known one of two shipwrecked men on a plank able to sustain only one of them; and the conclusion is left by Sir Edward East entirely undetermined. What is true of Sir Edward East is true also of Mr. Serjeant Hawkins. The whole of his chapter on Justifiable Homicide assumes that the only justifiable

homicide of a private nature is in defence against force of a man's person, house, or goods. In the 26th section we find again the case of the two shipwrecked men and the single plank, with this significant expression from a careful writer, "It is said to be justifiable." So, too, Dalton, c. 150, clearly considers necessity and self-defence, in Sir Michael Foster's sense of that expression, to be convertible terms; though he prints without comment Lord Bacon's instance of the two men on one plank as a quotation from Lord Bacon, adding nothing whatever to it of his own; and there is a remarkable passage at page 339, in which he says that even in the case of a murderous assault upon a man, yet before he may take the life of the man who assaults him, even in self-defence, *cuncta prius tentanda.* The passage in Staundforde, on which almost the whole of the dicta we have been considering are built, when it comes to be examined, does not warrant the conclusion which has been derived from it. The necessity to justify homicide must be, he says, inevitable; and the example which he gives to illustrate his meaning is the very same which has just been cited from Dalton, showing that the necessity he was speaking of was a physical necessity and the self-defence a defence against physical violence. Russell merely repeats the language of the old text-books and adds no new authority nor any fresh considerations. Is there, then, any authority for the proposition which has been presented to us? Decided cases there are none. The case of the seven English sailors referred to by the commentator on Grotius and by Puffendorf has been discovered by a gentleman of the Bar — who communicated with my brother Huddleston — to convey the authority, if it conveys so much, of a single judge of the island of St. Kitts, when that island was possessed partly by France and partly by this country, somewhere about the year 1641. It is mentioned in a medical treatise published at Amsterdam, and is altogether, as authority in an English court, as unsatisfactory as possible. The American case cited by my brother Stephen in his digest from Wharton on Homicide, page 237, in which it was decided, correctly, indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my brother Stephen says, be an authority satisfactory to a court in this country. The observations of Lord Mansfield in the case of Rex *v.* Stratton and others (21 St. Tr. 1045), striking and excellent as they are, were delivered in a political trial, where the question was whether a political necessity had arisen for deposing a governor of Madras. But they have little application to the case before us, which must be decided on very different considerations. The one real authority of former times is Lord Bacon, who in his commen-

tary on the maxim, "Necessitas inducit privilegium quoad jura privata," lays down the law as follows: "Necessity carrieth a privilege in itself. Necessity is of three sorts, — necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First, of conservation of life. If a man steals viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side, to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither *se defendendo* nor by misadventure, but justifiable." On this it is to be observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundfourde, whom he cites for it, and is expressly contradicted by Lord Hale in the passage already cited. And for the proposition as to the plank or boat, it is said to be derived from the canonists; at any rate he cites no authority for it, and it must stand upon his own. Lord Bacon was great even as a lawyer; but it is permissible to much smaller men, relying upon principle and on the authority of others the equals and even the superiors of Lord Bacon as lawyers, to question the soundness of his dictum. There are many conceivable states of things in which it might possibly be true; but if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbor, it certainly is not law at the present day. There remains the authority of my brother Stephen, who both in his Digest (Art. 32) and in his "History of the Criminal Law" (vol. 2, p. 108), uses language perhaps wide enough to cover this case. The language is somewhat vague in both places, but it does not in either place cover this case of necessity, and we have the best authority for saying that it was not meant to cover it. If it had been necessary, we must with true deference have differed from him; but it is satisfactory to know that we have, probably at least, arrived at no conclusion in which, if he had been a member of the court, he would have been unable to agree. Neither are we in conflict with any opinion expressed upon this subject by the learned persons who formed the Commission for preparing the Criminal Code. They say on this subject: "We are not prepared to suggest that necessity should in every case be a justification; we are equally unprepared to suggest that necessity should in no case be a defence. We judge it better to leave such questions to be dealt with when, if ever, they arise in practice, by applying the principles of law to the circumstances of the particular case." It would have been satisfactory to us if these eminent persons could have told us whether the received definitions of legal necessity were in their judgment correct and exhaustive, and, if not, in what way they should be amended; but

as it is we have, as they say, "to apply the principles of law to the circumstances of this particular case." Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their sovereign or in the defence of their country. Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity. But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is, generally speaking, a duty; but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the "Birkenhead," — these duties impose on men the moral necessity, not of the preservation but of the sacrifice, of their lives for others, from which in no country — least of all, it is to be hoped, in England — will men ever shrink, as indeed they have not shrunk. It is not correct, therefore, to say that there is any absolute and unqualified necessity to preserve one's life. "Necesse est ut eam, non ut vivam," is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on Necessity to which so much reference has been made. It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, — from Horace, from Juvenal, from Cicero, from Euripides, — passage after passage in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics. It is enough in a Christian country to remind ourselves of the Great Example which we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in

deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting was chosen. Was it more necessary to kill him than one of the grown men? The answer must be, No.

> "So spake the Fiend; and with necessity,
> The tyrant's plea excused his devilish deeds."

It is not suggested that in this particular case the "deeds" were "devilish;" but it is quite plain that such a principle, once admitted, might be made the legal cloak for unbridled passion and atrocious crime. There is no path safe for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment, and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it. It must not be supposed that, in refusing to admit temptation to be an excuse for crime, it is forgotten how terrible the temptation was, how awful the suffering, how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder; that the facts as stated in the verdict are no legal justification of the homicide; and to say that, in our unanimous opinion, they are, upon this special verdict, guilty of murder.

Sir Henry James, Attorney-General, prayed the sentence of the Court.

The Lord Chief Justice thereupon passed sentence of death in the usual form.[1]

Judgment for the Crown.

[1] The prisoners were afterwards respited and their sentence commuted to one of six months' imprisonment without hard labor.

CHAPTER XXI.

Rape and Carnal Knowledge of Children.

Section 1. Rape.

REGINA *v.* DEE,

15 Cox C. C. 579 [1884].

COURT FOR CROWN CASES RESERVED FOR IRELAND.

. . . . . .

May, C. J. The question which arises on the case is whether, in point of law, the prisoner should be considered as guilty of rape. There is not, I think, any doubt or dispute as to the facts and circumstances of the case. Upon the report of the judge, who was myself, and the findings of the jury, it is, I think, established that Judith Gorman, the wife of one J. Gorman, who was absent, having gone out to fish, lay down upon a bed in her sleeping room in the evening when it was dark; that the prisoner came into the room, personating her husband, lay down upon her, and had connection with her; that she did not at first resist, believing the man to be her husband, but that on discovering that he was not her husband, which was after the commencement but before the termination of the proceeding, her consent or acquiescence terminated, and she ran downstairs. It appeared, I think manifestly, that the prisoner knew the woman was deceived, as she said to the prisoner in his presence and hearing when he came into the room, "You are soon home to-night," to which he made no reply. At the time my own opinion, founded upon well known cases in England, was that the prisoner was not guilty of rape, but at the request of the counsel for the Crown I left certain questions to the jury, and upon their findings directed them to find a verdict of guilty, reserving the case for the consideration of this court, which is now called upon to decide the question which arises. There have been several cases in England which have arisen on the point whether the having connection with a married woman by personation of her husband amounts to the crime of rape. Rape may be defined as sexual connection with a woman forcibly and without her will: Regina *v.* Fletcher, 8 Cox C. C. 134. It is plain however "forcibly" does not mean

violently, but with that description of force which must be exercised in order to accomplish the act, for there is no doubt that unlawful connection with a woman in a state of unconsciousness, produced by profound sleep, stupor, or otherwise, if the man knows that the woman is in such a state, amounts to a rape. The case which the court has to deal with is that of connection with a married woman obtained by personation of the husband while the woman is awake. On this point subtle distinctions have been drawn. The earliest reported case appears to be that of Rex *v.* Jackson, Russ. & Ry. 487. There the prisoner was convicted of burglary with intent to commit a rape on a married woman. It appeared in evidence that the prisoner got into the woman's bed as if he had been her husband and had partial connection with her. The case was considered by the twelve judges. Four of the judges thought having carnal knowledge of a woman while she was under the belief that the man is her husband would be a rape, but the other eight judges thought it would not; but several of the eight judges intimated that if the case should occur again they would advise the jury to find a special verdict. This case cannot be regarded as one of much authority. Doubts seem to have existed in the minds even of the majority. However, in Regina *v.* Saunders, 8 C. & P. 265, in the year 1838, a married woman, a Mrs. Cleasby, in like manner submitted to connection with a man believing him to be her husband, but on discovering the mistake she ran and hanged herself, but was cut down and recovered. Gurney, B., directed the jury that the evidence did not establish a rape, as she consented, but that if they found that it was a fraud on her and that she did not consent as to the person, they might find the prisoner guilty of an assault, which was accordingly so found, the court proceeding on the enactment of 7 Will. IV. & 1 Vict. c. 85, § 11, which provides that on the trial of any person for any felony which includes an assault, the jury may acquit of the felony and find the party guilty of an assault, if the evidence should warrant such finding. I do not myself understand the application of the statute. If the consent of the woman prevented the crime being a rape, it would seem that it would also prevent it being an assault, which consent excludes. The same point arose in the case of Regina *v.* Clarke, 1 Dears. C. C. 397, where under similar circumstances the jury having found the prisoner guilty, the judge reserved the case, and upon argument the judges held that they were bound by the decision in R. *v.* Jackson, and that they ought not to allow the question to be opened, and the conviction was quashed. Regina *v.* Barrow is reported in 1 L. Rep. C. C. R. 156. All the judges, Bovill, C. J., Channell, B., Byles, Blackburn, and Lush, JJ., there held, under similar circumstances, that when the consent is obtained by fraud, the act does not amount to

rape; contrary, however, to the opinion of Kelly, C. B., before whom the case was tried, expressed at the trial. The case of Regina *v.* Flattery was not a case of personation of a husband but of sexual connection by a medical man, under pretence of his performing a surgical operation on a woman. In that case the prisoner was adjudged guilty of rape, it being clear that the woman did not submit knowingly to connection but to a different act, Kelly, C. B. saying, "The case is therefore not within the authority of those cases which have been decided, decisions which I regret, that where a man by fraud induces a woman to submit to sexual connection it is not rape." Mellor, Denman, and Field, JJ., and Huddleston, B., all expressed their dissatisfaction with the dictum of Rex *v.* Jackson, and their desire that the case should be reconsidered. The last case on the subject of personation appears to be that of Regina *v.* Young, 14 Cox C. C. 114. Though the prisoner was held to have been properly convicted in that case, it does not clearly illustrate the precise point which is now before us, for on the facts as explained by the judge who tried the case it appeared that the commencement of the sexual connection in that case, which was one of personation, took place while the woman was asleep. Before its completion, however, she awoke and called out to her husband. It would seem that the criminal and felonious act of penetration was completed while the woman was asleep and therefore unconscious. It is well settled, as I have observed, that connection with a woman while unconscious does constitute rape. The question arises now for our consideration, Are we bound to follow the decisions in England to which I have referred? The series of cases to which I have drawn attention appear to be an echo of the first case of Rex *v.* Jackson. The others followed, no further argument being treated as necessary. Nevertheless if the doctrine thus established had been adopted by the judges in England without objection, I do not think that this court should establish a different legal determination, unanimity on such points being of great importance. In its inception, however, that original case of Rex *v.* Jackson was dissented from by four of the twelve judges who heard it, while of the majority several apparently doubted the doctrine there contended for. In the case of Regina *v.* Flattery all the judges desired that this doctrine should be reconsidered. In Ireland, until the present case, no similar question seems to have arisen; and it appears to me, under all the circumstances, that it is competent for us, and it is our duty, to consider the doctrine of those English decisions upon their merits. Now, rape being defined to be sexual connection with a woman without her consent, or without and therefore against her will, it is essential to consider what is meant and intended by consent. Does it mean an

intelligent, positive concurrence of the will of the woman, or is the negative absence of dissent sufficient? In these surgical cases it is held that the submission to an act believed to be a surgical operation does not constitute consent to a sexual connection, being of a wholly different character; there is no *consensus quoad hoc*. In the case of personation there is no *consensus quoad hanc personam*. Can it be considered that there is a consent to the sexual connection, it being manifest that, had it not been for the deceit or fraud, the woman would not have submitted to the act? In the cases of idiocy, of stupor, or of infancy, it is held that there is no legal consent from the want of an intelligent and discerning will. Can a woman, in the case of personation, be regarded as consenting to the act in the exercise of an intelligent will? Does she consent, not knowing the real nature of the act? As observed by Mr. Curtis, she intends to consent to a lawful and marital act, to which it is her duty to submit. But did she consent to an act of adultery? Are not the acts themselves wholly different in their moral nature? The act she permitted cannot properly be regarded as the real act which took place. Therefore the connection was done, in my opinion, without her consent, and the crime of rape was constituted. I therefore am of opinion that the conviction should stand confirmed.

. . . . . .

[Opinions to the same effect were also delivered by the other judges.]

WYATT *v.* STATE,

2 Swan, 394 [1852].

The prisoner was convicted at the February term, 1852, of the Circuit Court of Dickson county, Pepper, J., presiding, and sentence of death pronounced upon him, whereupon he appealed in error.

Attorney-General, for the State, said: Although I have been unable to find, in any of the books, the reason of the distinction which is made between the perpetration of the offence of rape, when committed by force, and the same *moral* offence, when committed by fraudulent deception of the female, yet the cases in which the question has been made are all against the statement of the circuit judge in this instance. 1 Russel Cr. 677; Roscoe Cr. Ev. 798; Jackson's Case, Russ. & Ry. 487; Field's Case, 4 Leigh, 648; Saunders' Case, Eng. Com. L. Rep. 34, p. 383; and Williams' Case, *id.* p. 392. In Roscoe Ev. p. 798, n. 1, it is said: "It seems that it is as much a rape when effected thus, by stratagem, as by force." To support this, reference is made

to 1 Wheeler's Criminal Cases, 378, 381, n.; and also to Fields' Case, in 4 Leigh, above cited. The latter case is at variance with the note in Roscoe.

CARUTHERS, J., delivered the opinion of the Court.

This is an indictment for burglary, in the Circuit Court of Dickson county. The first count charges an intent to commit larceny; the second, to commit a rape upon the body of Mrs. Catherine Francis Evans, a free white woman; and the third, an assault with intent to commit a rape upon Mrs. Evans.

It was proved that the prisoner forced the door of the dwelling-house of the prosecutor, in which he and his wife were sleeping, about 11 or 12 o'clock at night; that he approached the bed in which they were sleeping and put his hand upon her, which aroused her from sleep, and she gave the alarm, when the prisoner fled, the prosecutor pursuing him with his dogs and gun, until he overtook, shot, and disabled him.

The error alleged and relied upon for a new trial is in that part of the judge's charge to the jury, which is in these words: "If the jury believe that the defendant attempted, either by force, or by fraudulently inducing the prosecutor's wife to believe that it was her husband, and thereby to have carnal knowledge of her, that then they ought to find him guilty."

The jury find a general verdict of guilty. They make no reference in their verdict to the separate counts, nor are they informed in the charge that they would have a right to find separately, and differently on the several counts. We cannot know, therefore, whether they would have found a verdict of guilty, or not guilty, on the first count. If that had been the verdict, it would not have been material whether the above charge on the other counts was correct or not. We cannot therefore know but that the general conviction was based on the second or third counts. If that were so, it becomes vitally material to decide whether the law is correctly laid down in the part of the charge above extracted. We agree with the Attorney-General that the moral turpitude of the crime would be as great when perpetrated by fraud and deception as by force. If we had the power to make the law on that subject, we would not hesitate to have it as charged by his honor the circuit judge; and we doubt not but that the legislature will so enact, whenever the case is brought to their attention. In the black catalogue of crimes, there is none which so shocks all men as the one under consideration; none should be more severely punished. But we cannot permit even a slave to be punished, without the full benefit of the law as it is, either under the influence of popular feeling or our own abhorrence at his acts. The question with us should ever be, not what the offence

deserves nor what our feelings and individual opinions would dictate, but "what sayeth the law."

We need not now go back into the books of the common law for a definition of felonies; they are given in our penitentiary code, Act of 1829, c. 23. It declares, § 19, that "burglary is the breaking and entering into a mansion house by night, with intent to commit a felony." § 13: "Rape is the unlawful carnal knowledge of a woman, forcibly and against her will." § 53: "Any assault and battery upon any female, with intent forcibly, and against her will, to have unlawful carnal knowledge of such female" is a felony. By the Act of 1819, c. 35, § 1: "Murder, arson, burglary, rape, and robbery shall, when committed by a slave, be deemed capital offences, and be punished with death; provided that the punishment in no case shall extend to life or limb, except in the cases above enumerated." Car. & Nich. 679. By the Act of 1835, c. 19, § 10, it is enacted "that any slave who shall commit an assault or battery upon any free white person, with an intent to commit murder in the first degree; *or a rape upon a free white woman*, shall, on conviction, be punished with death by hanging." Car. & Nich., 683. The Act of 1833, c. 75, is to the same effect, except that it applies to free negroes as well as slaves; but seems to require, in addition to the assault, that some violence to the person must be committed to constitute the offence."

An assault, then, with intent to commit a rape, is a capital felony in a slave. But what is the offence that he must intend to commit? It is rape; and the law defines that crime to be the *forcible carnal* knowledge of a female. To break into and enter a mansion house by night, "with intent to commit a felony," is burglary, which is a capital offence in a slave. The intent to commit a rape, or to make an assault with that intent, is a capital felony in a slave. But the intent is as essential as the act to constitute that felony; and to make out that felony, the intent must be to have the unlawful carnal knowledge of the woman, "*forcibly*, and against her will." But the law is laid down differently in the charge in this case. Actual force is excluded as an essential element of the crime. His honor declares the law to be that if his intent was to accomplish his object by fraudulently inducing the lady to believe he was her husband, and in that way attempted to have carnal knowledge of her, the offence would be complete.

The idea of force, as one ingredient of the offence, according to all the definitions in our acts and in all the criminal authorities, is entirely discarded in the instruction to the jury and was well calculated to mislead them. We do not pretend to give or enunciate any opinion on the sufficiency or insufficiency of the proof in this case, to produce a conviction upon a correct charge of the law, upon all or any one of

the counts in this indictment. That will be determined by another jury, under a charge of the law as here expounded and settled. If he has forfeited his life, let it be legally taken, and the law will be thereby honored and public justice sustained.

To these conclusions we are brought by an exposition of our own acts of assembly. But we find the same principles laid down in the decided cases and the works on criminal law, to which we will only refer: 1 Russell on Crim's, 677; Roscoe Cr. Ev. 798; Saunders' Case, Eng. Com. Law Rep. vol. xxxiv., p. 383; and Williams' Case, *id.* 392; Fields' Case, 4 Leigh, 648; 3 Chitty Cr. Law, 810. In most of these cases, the precise point of this case came up and was decided as we now decide the question. The current of authority is almost, if not entirely, unbroken on the subject. There is no respectable conflicting authority known to us. *Fraud* and stratagem, then, cannot be substituted for *force*, as an element of this offence, according to the existing law.

We are then constrained, for this error in the charge, to reverse the judgment and remand the defendant for a new trial.

SECTION 2. THE RELATION OF THE OFFENCES OF RAPE AND CARNAL KNOWLEDGE OF CHILDREN.

REGINA *v.* DICKEN,

14 Cox C. C. 8[1] [1877.]

PRISONER was indicted for a rape on Rose Bickerton. Evidence was given to show that the prisoner had violated the prosecutrix without her consent. She was a girl above the age of twelve and under the age of thirteen years at the time the offence was committed.

C. J. Darling, for the prisoner, argued that the prisoner could not be convicted of felony. He was charged with rape. That offence consisted in his unlawfully and carnally knowing the girl against her will; *i. e.*, without her consent. But such an offence was now defined in 38 & 39 Vict. c. 94, § 4, and thereby declared to be a misdemeanor. Consequently with respect to girls between the age of twelve and thirteen, the earlier statutes making that offence a felony were repealed.

MELLOR, J. The prisoner is indicted for rape under the general law. The prosecutrix happens to be above the age of twelve and under the

[1] [Affirmed by the Court for Crown Cases Reserved, Regina *v.* Ratcliffe, 15 Cox C. C. 127.]

age of thirteen years, and that circumstance is relied on for the defence. The carnal abuse of children having excited the attention of the legislature, they have been specially protected by Acts of Parliament. 24 & 25 Vict. c. 100, § 51, enacted that "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, shall be guilty of a misdemeanor." Under this provision an offender was punishable whether the girl did or did not consent to his act. In 1875 it was thought desirable that further protection should be given to young girls, and the limit of ten years was extended, by 38 & 39 Vict. c. 94, § 4, declaring that "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years, and under the age of thirteen, whether with or without her consent, shall be guilty of a misdemeanor." *Ex abundanti cautela* the words "whether with or without her consent" were inserted in the later enactment; but save in respect of the alteration in the age of the girl, the law remained exactly as it was previously, — that is to say, if she consented, the prisoner might be convicted of the statutory misdemeanor; if she did not, *a fortiori* he might be so. But if she did not consent, his offence would amount also to the higher crime — the felony — of rape, and he might be indicted and tried for it quite irrespective of the modern statutes throwing special protection around children. The present indictment is for rape, and therefore, if the girl consented to the carnal knowledge, the act was not done "against her will," and the crime is not made out. It would be preposterous to suppose that Parliament intended to repeal the law of rape as to girls of the very age during which extra statutory protection is cast over them, and I am clearly of opinion that no such repeal has been effected.

Verdict, guilty; sentence, ten years penal servitude.

By a note to 38 & 39 Vict. c. 94, § 3, in his Digest of the Criminal Law, p. 173, Sir James F. Stephen writes of the phrase "whether with or without her consent," "These words are obviously a mistake. In the preceding section (where they do not appear) they would have been superfluous but harmless. In this section they are mischievous; for if taken literally, they make it impossible to commit a rape upon a girl between twelve and thirteen, as they provide that carnally to know a girl between twelve and thirteen, without her consent, is a misdemeanor. The words ought either to be omitted altogether, or else changed into 'even with her consent.' Probably the Court would so construe them, for it is impossible to suppose that Parliament can have intended the monstrous consequence pointed out above." [Reporter's note.]

COMMONWEALTH *v.* SUGLAND,

4 Gray 7 [1855].

Rape. The indictment alleged that the defendant, at Williamsburgh in the county of Hampshire, "with force and arms, in and upon one Julia A. Alvord of said Williamsburgh, then and there in the peace of said commonwealth being, did violently and feloniously make an assault, and her, the said Julia A. Alvord, did then and there, by force, and against her will, feloniously ravish and carnally know, against the peace of said commonwealth and the form of the statute in such case made and provided."

The defendant being tried in the Court of Common Pleas and found guilty, moved in arrest of judgment, because it was not alleged in the indictment whether the said Julia was or was not of the age of ten years, and because the indictment was wholly insufficient. But Sanger, J. overruled the motion, and the defendant alleged exceptions.

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Dewey, J. The exception taken to the sufficiency of this indictment, if well founded, would show that there has been in our criminal pleading, in indictments for the crime of rape, as usually drawn, a fatal defect in omitting to state that the female alleged to have been forcibly ravished was of the age of ten years or more. This fact should not lead us to sustain the practice, if found to be erroneous, but is not to be entirely overlooked in the consideration of the question before us. It is true that the precise form of the enactment for the punishment of rape, on which this indictment is founded, was first introduced in 1836. Rev. Sts. c. 125, § 18. But in the early statutes of the colony, enacted in 1649 and 1669, we find provisions very similar to the present statute, taking the distinction that the act must be done by force if the female was above the age of ten years; but if under ten years of age, the act should still be punished with death though the act was done with her consent. Anc. Chart. 60. The province law of 1697 varied in the language and enacted that "if any man shall ravish any woman, by force against her will, or if any man shall unlawfully and carnally know and abuse any woman child under the age of ten years," he shall be punished with death. Anc. Chart. 301. The Sts. of 1784, c. 65, and 1805, c. 97, were very much to the same effect. No doubt would exist as to the sufficiency of the present indictment under either of the two statutes last cited; and the commissioners on the Revised Statutes give no intimation, in their report, of any purpose to change the existing law.

The provisions of the Rev. Sts. are quite similar to those which have been enacted in many other States of the Union; but we do not understand that any change has been introduced in any of them in the ancient form of charging the offence. In North Carolina this very form of indictment has been held sufficient. State *v.* Farmer, 4 Ired. 226.

The construction practically put upon our statutes has been, that the allegation of having, by force and against her will, ravished and carnally known any female was a description of the offence punishable by the statute; and that it was only necessary to allege her age when the indictment did not allege that the act was done against her will. The real object of the provision of the statute, as to the punishment of offences of this character upon females under ten years of age, was to secure the punishment of rape in all cases and to remove any doubts that might have formerly existed.

By our statutes, the punishment for rape embraces all cases of violation of females of any age. If the party assaulted be above the age of ten years, then, to constitute the offence of rape, the act must have been committed by force and against her will. But if it be upon a child under the age of ten years, it is alike punishable under the statute, whether committed with the consent or against the will of such female child. The present indictment alleges the female to have been ravished and carnally known by force and against her will, and the jury have found the prisoner guilty of this charge. The finding of the jury shows that the prisoner had perpetrated all the acts necessary to constitute the offence punishable by the statute under either of its provisions; and the punishment being precisely similar and absolute in its extent, whether the rape were perpetrated upon a female over or under ten years of age, the Court are of opinion that no sufficient ground is shown for arresting the judgment, and the prisoner may properly be sentenced under the St. of 1852, c. 259, to imprisonment for the term of his life.[1] *Exceptions overruled.*

COMMONWEALTH *v.* ROOSNELL,

143 Mass. 32 [1886].

Two indictments, each containing two counts and alleging that the defendant, on March 22 and 23, 1886, respectively, at Fitchburg, in

[1] [As to the question of consent in charges of assault with intent upon infants of tender years and of attempt to carnally know such children, see Regina *v.* Martin, 2 Moody C. C. 129, above, p. 123].

and upon a female child named, she being under the age of ten years, "feloniously did make an assault with intent the said" child "then and there feloniously to unlawfully and carnally know and abuse."

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C. ALLEN, J. The chief argument for the defendant is that an indictment for an assault upon a female child under the age of ten years, with intent to unlawfully and carnally know and abuse her, cannot be maintained without proof that the acts were done without her consent; that the carnal knowledge and abuse of a child is a special statutory offence, distinct from the crime of rape; and that the consent of the child is no defence to the substantive crime, because the statute expressly so provides or implies, but is a defence to the assault with intent, because the terms of the statute do not extend to the assault and because an assault consented to is no assault in law. And there are many decisions, both English and American, some of which are cited, which sustain this defence. But it is not a valid defence in this Commonwealth.

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The difficulty in England appears to have arisen from the phraseology of the early statutes, punishing carnal knowledge and abuse of a young girl, whether by her own consent or without her consent, apparently implying that she might consent thereto. See Regina *v.* Johnson, 10 Cox C. C. 114. But there has been no such language in any of the Massachusetts statutes; and even if there had been, it is more in accordance with the spirit of the law simply to hold a girl under the age of ten years incapable of giving a valid consent, so that the question whether she did or did not give a formal or apparent consent becomes immaterial. If, as all agree, it is immaterial upon a charge of committing the completed act, which includes an assault, no reason but an extremely technical one can be urged why it should not be so upon a charge of assault with intent to commit the completed act. Indeed, to speak of an assault upon her without her consent with intent to carnally know and abuse her with her consent, seems to involve a contradiction in terms. But when it is once considered that the intention of the law is to declare that a young girl shall be deemed incapable of consenting to such an act to her injury and that evidence of any consent by her shall be incompetent in defence to an indictment therefor; and that, although she gives a formal and apparent consent, yet in law, as in reality, she gives none, because she does not and cannot take in the meaning of what is done, all legal difficulty disappears, and the conclusion may properly be reached that the assault is without her consent and against her will. This principle has been clearly maintained with reference to kidnapping children and removing young

slaves from the Commonwealth. Commonwealth *v.* Nickerson, 5 Allen, 518; Commonwealth *v.* Taylor, 3 Met. 72, 73; Commonwealth *v.* Aves, 18 Pick. 193, 225; State *v.* Rollins, 8 N. H. 550; State *v.* Farrar, 41 N. H. 53. The same principle has also been maintained in some other States, in cases of indecent assaults. People *v.* McDonald, 9 Mich. 150; Hays *v.* People, 1 Hill (N. Y.) 351; Singer *v.* People, 13 Hun, 418; State *v.* Dancy, 83 N. C. 608; State *v.* Johnston, 76 N. C. 209. See also Givens *v.* Commonwealth, 29 Grat. 830; The Queen *v.* Dee.[1]

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Exceptions overruled.

CHAPTER XXII.

LARCENY.

THE PRELIMINARY QUESTION OF POSSESSION.

CARTWRIGHT *v.* GREEN,

8 VES. 405 [1802].

THE bill stated that Ann Cartwright died possessed of a bureau, in a secret part of which she had concealed 900 guineas in specie. After her death Richard Cartwright, her personal representative, lent the bureau to his brother Henry, who took it to the East Indies and brought it back, the contents remaining still undiscovered. It was then sold to —— Dick for three guineas, who delivered it to the defendant Green, a carpenter, for the purpose of repairing it. Green employed a person named Hillingworth, who found out the money and received a guinea for his trouble, and the whole sum of 900 guineas was possessed by the three defendants, Green, his wife, and Elizabeth Sharpe, who secreted and converted it to their own use.

This bill, charging all these circumstances and that Green paid his debts and bought stock, for which he had no other means except the money found in the bureau, prayed a discovery, stating that the plaintiff Cartwright had brought an action as personal representative of Ann Cartwright. Dick joined in the bill as a plaintiff, but did not set up any claim to the money on his own account.

The three defendants demurred, stating as the ground of demurrer that the discovery sought may subject the defendants to criminal punishment.

[1] [Above, p. 203.]

Mr. Hart, in support of the demurrer. This bureau was trusted to the defendant Green for the specific purpose of repairs. Therefore the allegation of opening the drawer and taking the money amounts to a charge of a felonious taking; as in the case of a common carrier breaking open a parcel and taking part of the property from it, which is a felony. . . .

Mr. Romilly and *Mr. Hall,* in support of the bill. This case is very distinct from that of a bailee, carrier, etc., opening and taking goods delivered for some special purpose. This bureau was delivered by Dick, the visible owner by purchase, but not of these effects, supposing himself to have nothing but the bureau, not imagining anything was contained in it. There is a strong distinction in point of morality between a delivery of goods for a particular purpose and such a delivery as this, without knowing it. Green might take out the money with a view to find the owner. The purpose of repair required him to open every part of the bureau. The finding was sufficient information that Dick was not the owner. It was like finding and appropriating property, the owner of which was not known, which, though done *animo furandi*, is unquestionably not a felony according to Lord Hale. If this can be considered as something of delivery, yet it would not amount to a felony. In the case of a horse hired and not returned, if obtained colorably with a view to the conversion, that may amount to a felony, but if the original object was lawful, as for a journey, the subsequent conversion is not a felony. So a conversion of cloth delivered by a clothier, or property received by a carrier, was not a felony. Then came the case of a package opened, but there the purpose and the property were known; it was evidently taken not for the purpose of carrying it, but for the purpose of committing a felony. Certainly the distinctions lately introduced, unknown to the common law, between taking a part and the whole, are very nice.

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Mr. Hart, in reply. . . . Dick was in complete possession of this bureau and its contents, a possession sufficient to sustain a prosecution for felony. Where is the losing and finding in this case, which are relative terms? The bill states applications to the defendant, when this discovery was made, the answer to which was a denial. That would be evidence before a jury as to the unlawful purpose. The bill represents the purpose of the delivery to make some trifling repairs, — not a complete repair, making it necessary to search every part. How can this be distinguished from the case of a bailee or carrier, the purpose of delivery being specific, a part of the property being taken and severed, like the case of the miller taking part of the corn out of the sack.

The Lord Chancellor [Eldon]. Finally the question in this case will be, whether the bill charges a felony or not. To the objection that the demurrer covers too much, the answer is, that the bill is in aid of an action, and if it appears upon the bill that the action is founded in a felony, the policy of the law requires that the Court should not give the discovery. As to the ground that the wife being present with her husband could not be punished, and therefore the demurrer is bad because all three joined, the answer is, that all the three may now join *ore tenus* in another ground of demurrer, which would be good, namely, that the discovery is in aid of an action, which, if founded in felony, the Court cannot aid. The question therefore is reduced to this, whether the facts stated amount to felony or larceny, upon which the distinctions are so extremely nice and depend upon attention to so many cases and are so important in the consequences, that I will not trust myself to say anything upon them, until I have seen all the cases and consulted several of the judges.

April 28. The Lord Chancellor [Eldon]. This case involves a very delicate consideration in equity, for, whatever was the old doctrine as to larceny, distinctions have been taken in late cases, which make it frequently the subject of very nice consideration whether the taking is a trespass or only a breach of trust. I have looked into the books and have talked with some of the judges and others, and I have not found in any one person a doubt that this is a felony. To constitute felony there must of necessity be a felonious taking. Breach of trust will not do. But from all the cases in Hawkins there is no doubt, this bureau being delivered to the defendant for no other purpose than repair, if he broke open any part which it was not necessary to touch for the purpose of repair but with an intention to take and appropriate to his own use what he should find, that is a felonious taking within the principle of all the modern cases, as not being warranted by the purpose for which it was delivered. If a pocket-book containing bank notes was left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket and the notes out of the pocket-book, there is not the least doubt that is a felony. So, if the pocket-book was left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly, but not being intrusted with it for the purpose of opening it; and that is a felony according to the modern cases. There is a vast number of other cases. Those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it.

This demurrer therefore must be allowed.

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MERRY *v.* GREEN,

7 M. & W. 623 [1841].

TRESPASS for assault and false imprisonment. [Defence that the plaintiff had committed a theft and that the defendant had lawfully caused his arrest and detention.]

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At the trial before Tindal, C. J., at the last Warwickshire Assizes, the following appeared to be the facts of the case. Messrs. Mammatt and Tunnicliffe, who had for some time resided together at Ashby-de-la-Zouch, in the same house, and keeping the same table and servants, in October, 1839, broke up their establishment and sold their furniture (which was partly joint and partly separate property) by public auction. At that sale the plaintiff, who was a shoemaker also residing in Ashby, became the purchaser, at the sum of £1 6*s*., of an old secretary or bureau, the separate property of Mr. Tunnicliffe. The plaintiff kept the bureau in his house, and on the 18th of November following, he sent for a boy of the name of Garland, a carpenter's apprentice, to do some repairs to the bureau. While Garland was so engaged, he remarked to the plaintiff that he thought there were some secret drawers in the bureau, and touching a spring, he pulled out a drawer which contained a quantity of writings. The plaintiff then discovered another drawer, in which was a purse containing several sovereigns and other coins, and under the purse a quantity of bank notes. Of this property the plaintiff took possession, and telling Garland that the notes were bad, he opened the purse and gave him one of the sovereigns, at the same time charging him to keep the matter secret. Garland being interrogated by his parents how he came by the possession of the sovereign, the transaction transpired; and it being subsequently discovered that the plaintiff had appropriated the property to his own use, falsely alleging that he had never had possession of a great portion of it, the defendants (one of whom was the solicitor of Mr. Tunnicliffe) went with a police officer to the plaintiff's house, took him into custody, and conveyed him before a magistrate, on a charge of felony. The plaintiff was ultimately discharged, the magistrate doubting whether a charge of felony could be supported. At the trial, a witness of the name of Hannah Jenkins was called on behalf of the plaintiff, who deposed that she was present at the auction and remembered the piece of furniture in question being put up for sale and bought by the plaintiff; that after it was sold, an observation was made by some of the bystanders

to the effect that the plaintiff might have bought something more than the bureau, as one of the drawers would not open, upon which the auctioneer said, "So much the better for the buyer;" adding, "I have sold it with its contents, and it is his." This statement was opposed by the evidence of the auctioneer, who stated, on cross-examination by the defendant's counsel, that there was one drawer which would not open, and that what he had said was, "That is of no consequence; I have sold the secretary and not its contents." It did not appear that any person knew that the bureau contained anything whatever.

The learned chief justice, in summing up, told the jury, that as the property had been delivered to the plaintiff as the purchaser, he thought there had been no felonious taking; and left to them the question of damages only, reserving leave for the defendant to move to enter a non-suit. The jury found a verdict for the plaintiff with £50 damages.

In Michaelmas term, *Whitehurst* obtained a rule to show cause why the verdict should not be set aside and a non-suit entered or a new trial had.

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PARKE, B. In this case there was clearly no *bailment*, because there was no intention to part with the property in question. It amounts therefore, only to a finding, and comes within the modern decisions on that subject. It is a matter fit for our serious consideration, and we will speak to the chief justice before we deliver our judgment. No doubt the same evidence is necessary in the present case as would be required to support an indictment. *Cur. adv. vult.*

The judgment of the Court was now delivered by —

PARKE, B. My Lord Chief Justice thought in this case that, even assuming the facts of which evidence was given by the defendant to be true, the taking of the purse and abstracting its contents was not a larceny; and that is the question which he reserved for the opinion of the Court, giving leave to move to enter a non-suit. After hearing the argument, we have come to the conclusion that, if the defendant's case was true, there was sufficient evidence of a larceny by the plaintiff; but we cannot direct a non-suit, because a fact was deposed to on the part of the plaintiff which ought to have been left to the jury, and which, if believed by them, would have given a colorable right to him to the contents of the secretary as well as to the secretary itself; namely, the declaration of the auctioneer that he sold all that the piece of furniture contained with the article itself: and then the abstraction of the contents could not have been felonious. There must therefore be a new trial and not a non-suit.

But if we assume, as the defendant's case was, that the plaintiff had express notice that he was not to have any title to the contents of the secretary if there happened to be anything in it, and indeed without such express notice, if he had no ground to believe that he had bought the contents, we are all of opinion that there was evidence to make out a case of larceny.

It was contended that there was a delivery of the secretary and the money in it to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us, that though there was a delivery of the *secretary* and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession *of the purse and money*. The vendor had no intention to deliver it nor the vendee to receive it; both were ignorant of its existence; and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this.

The old rule, that "if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny," has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion *animo furandi* constitutes a larceny. Under this head fall the cases where the finder of a pocket-book with bank notes in it with a name on them converts them *animo furandi;* or a hackney coachman, who abstracts the contents of a parcel which has been left in his coach by a passenger, whom he could easily ascertain; or a tailor who finds and applies to his own use a pocket-book in a coat sent to him to repair by a customer, whom he must know: all these have been held to be cases of larceny; and the present is an instance of the same kind and not distinguishable from them. It is said that the offence cannot be larceny unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems also from Wynne's Case, that if, under the like circumstances, he acquire possession and mean to act honestly, but afterwards alter his mind and *open* the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny.

We therefore think that the rule must be absolute for a new trial, in order that a question may be submitted to the jury whether the plain-

tiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a color of right to the property.

Rule absolute for a new trial.

REGINA *v.* ASHWELL,[1]

16 Cox C. C. 1 [1885].

CROWN CASE RESERVED.

Case reserved for the opinion of the Court by Denman, J., at the January Assizes, 1885, for the county of Leicester, which stated the following facts:—

On the 23d of January, 1885, Thomas Ashwell was tried for the larceny of a sovereign, the money of Edward Keogh.

Keogh and Ashwell met at a public house on the 9th of January.

At about eight p.m. Ashwell asked Keogh to go into the yard, and when there requested Keogh to lend him a shilling, saying that he had money to draw on the morrow, and that then he would repay him. Keogh consented, and putting his hand into his pocket, pulled out what he believed to be a shilling but what was in fact a sovereign, and handed it to Ashwell, and went home, leaving Ashwell in the yard. About nine the same evening Ashwell obtained change for the sovereign at another public house.

At 5.20 the next morning (the 10th) Keogh went to Ashwell's house and told him that he had discovered the mistake, whereupon Ashwell denied having received the sovereign, and on the same evening he gave false and contradictory accounts as to where he had become possessed of the sovereign he had changed at the second public house on the night before. But he afterwards said, "I had the sovereign and spent half of it, and I shan't give it him back because I only asked him to lend me a shilling."

[1] [Held (per Lord Coleridge, C. J., Grove and Denman, JJ., Pollock and Huddleston, BB., Hawkins and Cave, JJ.), that the taking was not complete when the sovereign was handed to A., and that there being an *animus furandi* on his part at the time when the taking was completed by his becoming aware of what it was which he had received, he was guilty of larceny at common law.

Held (per Field, Manisty, Stephen, Smith, Day, and Wills, JJ.), that the taking was complete at the time when K. handed the sovereign to A., and therefore as at that time there was not any *animus furandi* on A.'s part, he was not guilty of larceny at common law.

Held, further, by a majority of the court, that A. was not guilty of larceny as a bailee within 24 & 25 Vict. c. 96, § 3.]

Mr. Sills, for the prisoner, submitted that there was no evidence of larceny, no taking, no obtaining by trick or false pretence, no evidence that the prisoner at the time he received the sovereign knew it was not a shilling. He referred to Regina *v.* Middleton, L. Rep. 2 C. C. R. 43, 45.

Mr. A. K. Loyd, for the prosecution, called my attention to Stephen's Criminal Law Digest, art. 299, and to the cases relating to larceny of property found.

I declined to withdraw the case from the jury, thinking it desirable that the point raised should be decided by the Court of Criminal Appeal. The passage in Stephen's Digest referred to is as follows: "Theft may be committed by converting property which the owner has given to the offender under a mistake which the offender has not caused, but which he knows at the time when it is made, and of which he fraudulently takes advantage. But it is doubtful whether it is theft fraudulently to convert property given to the person converting it under a mistake of which that person was not aware when he received it."

The jury found that the prisoner did not know that it was a sovereign at the time he received it, but said they were unanimously of opinion that the prosecutor parted with it under the mistaken belief that it was a shilling, and that the prisoner, having soon after he received it discovered that it was a sovereign, could have easily restored it to the prosecutor, but fraudulently appropriated it to his own use and denied the receipt of it, knowing that the prosecutor had not intended to part with the possession of a sovereign, but only of a shilling. They added that, if it were competent to them consistently with these findings and with the evidence to find the prisoner guilty, they meant to do so.

I entered a verdict of guilty but admitted the prisoner to bail, to come up for judgment at the next assizes if this court should think that upon the above facts and findings the prisoner could properly be found guilty of larceny.

March 21. Before Lord Coleridge, C. J., Grove, Lopes, Stephen, and Cave, JJ.

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June 13. This case was re-argued before the following learned judges,—Lord Coleridge, C. J., Grove and Denman, JJ., Pollock, B., Field, J., Huddleston, B., Manisty, Hawkins, Stephen, Mathew, Cave, Day, Smith, and Wills, JJ.

. . . . . .

Smith, J. read the following judgment: The prisoner in this case was indicted for the larceny of a sovereign, the moneys of Edward Keogh. The material facts are as follows: Keogh handed to the prisoner the sovereign in question, believing it was a shilling and not

a sovereign, upon the terms that the prisoner should hand back a shilling to him when he (the prisoner) was paid his wages. At the time the sovereign was so handed to the prisoner he honestly believed it to be a shilling. Some time afterwards the prisoner discovered that the coin he had received was a sovereign and not a shilling, and then and there fraudulently appropriated it to his own use. Is this larceny at common law or by statute? To constitute the crime of larceny at common law, in my judgment there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent, there cannot be larceny at common law. The taking must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law. In c. 19, § 1, at p. 142 of vol. i. of Hawkins' Pleas of the Crown, it is stated: "It is to be observed that all felony includes trespass, and that every indictment of larceny must have the words *felonice cepit* as well as *asportavit*. Whence it follows that if the party be guilty of no trespass in taking the goods he cannot be guilty of felony in carrying them away." As I understand, the counsel for the Crown did not really dispute the above definition, and indeed, if he had, upon further referring to the 3d Institutes, chap. xlvii., p. 107, and the 1st Hale's Pleas of the Crown, p. 61, it would be found to be fully borne out by those writers. The two cases cited in argument, Rex *v.* Mucklow, 1 Moody's Crown Cases, 161, and Regina *v.* Davies, Dears. 640, are good illustrations of what I have enunciated; and if other cases were wanted there are plenty in the books to the same effect. In the present case it seems to me, in the first place, that the coin was not taken against the will of the owner, and if this be so, in my judgment it is sufficient to show that there was no larceny at common law; and secondly, it being conceded that there was no felonious intent in the prisoner when he received the coin, this, in my judgment, is also fatal to the act being larceny at common law. As to this last point, the law laid down by Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., in the case of Regina *v.* Middleton, L. Rep. 2 C. C. 45, is very pertinent; it is as follows: "We admit that the case is undistinguishable from the one supposed in argument of a person handing to a cabman a sovereign by mistake for a shilling; but after a careful weighing of the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and the question whether the cabman was guilty of larceny or not would depend upon this, — whether at the time he took the sovereign he was aware of the mistake and had

then the guilty intent, the *animus furandi*." I believe the above to be good law. The contention, however, of the Crown was that, although the above might be correct, yet the present case was to be likened to those cases in which finders of a lost chattel have been held guilty of larceny. The principle upon which a finder of a lost chattel has been held guilty of larceny is that he has taken and carried away a chattel, not believing that it had been abandoned, and at the time of such taking has had the felonious intent, — the proper direction to be given to a jury being, as I understood, "Did the prisoner at the time of finding the chattel intend to appropriate it to his own use, then believing that the true owner could be found, and that the chattel had not been abandoned?" See Regina *v.* Thurborn, 1 Denison's Crown Cases, 388 and Regina *v.* Glyde, L. Rep. 1 C. C. 139. If he did, he would be guilty of larceny; *aliter* he would not. Then it was argued, as argued it was by the counsel for the Crown, that the prisoner in this case was on the same footing as a finder of a chattel. In my judgment the facts do not support it. Keogh, in the present case, intended to deliver the coin to the prisoner and the prisoner to receive it. The chattel, namely the coin, was delivered over to the prisoner by its owner, and the prisoner received it honestly. He always knew he had the coin in his possession after it had been delivered to him. The only thing which was subsequently found was that the coin delivered was worth 240*d.* instead of 12*d.*, as had been supposed. This argument, as it seems to me, confounds the finding out of a mistake with the finding of a chattel. In some cases, as above pointed out, the finder of a chattel may be guilty of larceny at common law; but how does that show that the finder out of a mistake may also be guilty of such a crime? A mistake is not a chattel. The chattel (namely the coin) in this case never was lost; then how could it be found? In my judgment the argument upon the point for the Crown is wholly fallacious and fails. It was further urged for the Crown that the present case was covered by authority, and the cases of Cartwright *v.* Green, 8 Ves. 405, and Merry *v.* Green, 7 M. & W. 623, were cited in this behalf. I fail to see that either case is an authority for the point insisted upon by the Crown. In the first case, Cartwright *v.* Green, 8 Ves. 405, the question arose upon demurrer to a bill in Chancery as to whether a felony was disclosed upon the face of the bill. Lord Eldon, as he states in his judgment, decided the case upon the ground that, inasmuch as the bureau in question had been delivered to the defendant for no other purpose than repair, and he had broken open a part of it which it was not necessary to touch for the purpose of repair with the intention of taking and appropriating to his own use whatever he should find therein, it was larceny. I conceive this to be distinctly within the principle I have above stated, — there

was the taking against the will of the owner with the felonious intent at the time of taking. The other case, namely, Merry *v.* Green, 7 M. & W. 623, which was also the case of a purse in a secret drawer of a bureau which had been purchased at a sale, was clearly decided by Parke, B., who delivered the judgment of the Court, upon the principles applicable to a case of finding. The learned Baron says: "It seems to us that though there was a delivery of the secretary and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it nor the vendee to receive it; both were ignorant of its existence; and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a case of simple finding, and the law applicable to all cases of finding applies." I understand the learned Baron, when he says "the law applicable to all cases of finding applies," to mean the law applicable to the cases of finding a chattel; for there are no cases extant as to finding out a mistake to which his remark could apply. That, too, is the distinction between the present case and that before Parke, B. In Merry *v.* Green, 7 M. & W. 623, no intention to deliver the chattel (namely, the purse and money) at all ever existed, whereas in the present case there was every intention to deliver the chattel (namely, the coin), and it was delivered and honestly received. In my judgment, a man who honestly receives a chattel by delivery thereof to him by its true owner cannot be found guilty of larceny at common law, and in my opinion the prisoner in this case is not guilty of that offence. The second point has now to be considered, namely, was he guilty of larceny as a bailee within the true intent of § 3 of 24 & 25 Vict. c. 96? To constitute a person bailee of a chattel there must be a bailment and not a mere delivery of the chattel. There must be a delivery of a chattel upon contract express or implied to return the chattel or obey the mandate with which the delivery is clogged, or in other words a delivery upon condition. The question as it seems to me is this, Is the law in the present case to imply a condition when we know perfectly well that at the time of the delivery of the coin no condition at all was in the contemplation of the parties, excepting that a coin of like value should be returned to Keogh when the prisoner had drawn his wages? No condition to return the coin delivered to the prisoner was ever thought of, and in my judgment, such a condition cannot be implied. Should, however, any condition be implied as to what was to be done if or when any mistake not then contemplated should be discovered, my opinion is that the only condition, if any, which could be implied would be that the prisoner would not spend or use for his own purposes 19*s.* out of the 20*s.*; and I am of opinion that if the prisoner had, upon finding

out the mistake, taken to Keogh 19*s.*, he would have been strictly within his rights. The case of Regina *v.* Hassall, L. & C. 58, is an express authority to the effect that a person is not a bailee within the statute unless he is under obligation to return the identical chattel deposited with him. In my judgment the prisoner was not a bailee of the sovereign for the reasons above given. I am fully alive to the remark which has been made, that if the present case is not one of larceny, it should be. Whether this remark is well founded or not I do not pause to inquire; but it seems to me that the observations of Bramwell, B., in Regina *v.* Middleton, L. Rep. 2 C. C. 38, on this head are well worthy of consideration. Believing however, as I do, that according to the law of England, as administered from the earliest times, the present case is not a case of larceny at common law, I cannot hold otherwise than I do; and as for the reasons given above, the prisoner is not, in my opinion, guilty of larceny as a bailee, my judgment is that the conviction should be quashed.

CAVE, J. (As the learned judge was unable to attend, the following judgment, written by him, was read by Lord Coleridge, C. J.) The question we have to decide is, whether under the circumstances stated in the case the prisoner was rightly convicted of larceny, either at common law or as a bailee. It is undoubtedly a correct proposition that there can be no larceny at common law unless there is also a trespass, and that there can be no trespass where the prisoner has obtained lawful possession of the goods alleged to be stolen; or in other words, the thief must take the goods into his possession with the intention of depriving the owner of them. If he has got the goods lawfully into his possession before the intention of depriving the owner of them is formed, there is no larceny. Applying that principle to this case, if the prisoner acquired lawful possession of the sovereign when the coin was actually handed to him by the prosecutor, there is no larceny, for at that time the prisoner did not steal the coin; but if he only acquired possession when he discovered the coin to be a sovereign, then he is guilty of larceny, for at that time he knew that he had not the consent of the owner to his taking possession of the sovereign as his own, and the taking under those circumstances was a trespass. It is contended that, as the prosecutor gave and the prisoner received the coin under the impression that it was a shilling and not a sovereign, the prosecutor never consented to part with the possession of the sovereign, and consequently there was a taking by the prisoner without his consent; but to my mind, it is impossible to come to the conclusion that at the time when the sovereign was handed to him, the prisoner, who was then under a *bona fide* mistake as to the coin, can be held to have been guilty of a trespass in taking that which the prosecutor gave him. It

seems to me that it would be equally logical to say that the prisoner would have been guilty of a trespass if the prosecutor, intending to slip a shilling into the prisoner's pocket without his knowledge, had by mistake slipped a sovereign in instead of a shilling. The only point which can be made in favor of the prosecution, so far as I can see, is that the prisoner did not actually take possession until he knew what the coin was of which he was taking possession, in which case, as he then determined to deprive the prosecutor of his property, there was a taking possession simultaneously with the formation of that intention. Had the coin been a shilling, it is obvious that the prisoner would have gained the property in and the possession of the coin when it was handed to him by the prosecutor; as there was a mistake as to the identity of the coin no property passed, and the question is whether the possession passed when the coin was handed to the prisoner or when the prisoner first knew that he had got a sovereign and not a shilling. There are four cases which it is important to consider. The first is Cartwright *v.* Green, 8 Ves. 405, which however differs slightly from the present, because in that case there was no intention to give the defendant Green either the property in or the possession of the guineas, but only the possession of the bureau, the bailor being unaware of the existence of the guineas. If the bailee in that case had, before discovering the guineas in the secret drawer, negligently lost the bureau with its contents, it is difficult to see how he could have been made responsible for the loss of the guineas. In Merry *v.* Green, 7 M. & W. 623, the facts were similar to Cartwright *v.* Green, 8 Ves. 405, except that the bureau had been sold to the defendant. In that case Parke, B., says that though there was a delivery of the bureau to the defendant, there was no delivery so as to give a lawful possession of the purse and money in the secret drawer. If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not possession of that of the existence of which he is unaware. A man cannot without his consent be made to incur the responsibilities toward the real owner which arise even from the simple possession of a chattel without further title, and if a chattel has without his knowledge been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel and has assented to the possession of it. A case much urged upon us on behalf of the prisoner was Rex *v.* Mucklow, 1 Moody's Crown Cases, 160. In that case a letter containing a draft for £10 11*s.* 6*d.* had been delivered to the prisoner, although really meant for another person of the same name, and the prisoner appropriated the draft, and was tried and convicted of larceny. The conviction, however, was held wrong on the ground that he had no *animus furandi* when he first received the letter. Here, as

in the two previous cases, the prisoner was not at first aware of the existence of the draft, and when he became aware of it he must have known that it was not meant for him, yet the judges seem to have held that he got possession of the draft at the time when the letter was handed to him. In Regina *v.* Davies, Dearsley's Crown Cases, 640, the facts were similar to those in Mucklow's Case, 1 Moody's Crown Cases, 161; and Erle, C. J., then Erle, J., who tried the case, directed the jury that if at the time the prisoner received the order he knew it was not his property but the property of another person of known name and address, and nevertheless determined to appropriate it wrongfully to his own use, he was guilty of larceny, and that in his opinion the prisoner had not received it until he had discovered, by opening and reading the letter, whether it belonged to him or not. "I considered," says the judge, "that the law of larceny laid down in respect of articles found was applicable to the article here in question." The court, however, quashed the conviction on the authority of Mucklow's Case, 1 Moody's Crown Cases, 160. In Regina *v.* Middleton, L. Rep. 2 C. C. 38, in which it was held by eleven judges against four that, where there was a delivery of money under a mistake to the prisoner, who received it *animo furandi*, he was guilty of larceny, there occurs a passage in the judgment of some of the judges who formed the majority, which is as follows: "We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, — whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*." For my part I am quite unable to reconcile the cases of Rex *v.* Mucklow, 1 Moody C. C. 161 and Regina *v.* Davies, Dears. C. C. 640, and the passage I have cited from Regina *v.* Middleton, L. Rep. 2 C. C. 38, with those of Cartwright *v.* Green, 8 Ves. 405 and Merry *v.* Green, 7 M. & W. 623; and being compelled to choose between them, I am of opinion that the law is correctly laid down in Merry *v.* Green, 7 M. & W. 623, for the following reasons: The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact, presumed in law until the contrary is shown; but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession unaccompanied by ownership is of doubtful benefit; for although certain rights are attached to the possession of a chattel, they are accompanied also by liabilities toward the absolute owner which may make the possession more of a burden

than a benefit. In my judgment, a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. Now a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in Merry *v.* Green, 7 M. & W. 623, was not in possession of the purse and money until he knew of their existence. Moreover, in order that there may be a consent, a man must be under no mistake as to that to which he consents; and I think therefore that Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign. Suppose that while still ignorant that the coin was a sovereign he had given it away to a third person who had misappropriated it, could he have been made responsible to the prosecutor for the return of 20*s*? In my judgment he could not. If he had parted with it innocently, while still under the impression that it was only a shilling, I think he could have been made responsible for the return of a shilling and a shilling only, since he had consented to assume the responsibility of a possessor in respect of a shilling only. It may be said that a carrier is responsible for the safe custody of the contents of a box delivered to him to be carried, although he may be ignorant of the nature of its contents; but in that case the carrier consents to be responsible for the safe custody of the box and its contents whatever they may happen to be; and, moreover, a carrier is not responsible for the loss of valuable articles, if he has given notice that he will not be responsible for such articles unless certain conditions are complied with, and is led by the consignor to believe that the parcel given to him to carry does not contain articles of the character specified in the notice. Batson *v.* Donovan, 4 B. & A. 21. In this case, Ashwell did not hold himself out as being willing to assume the responsibilities of a possessor of the coin, whatever its value might be; nor can I infer that at the time of the delivery he agreed to be responsible for the safe custody and return of the sovereign. As, therefore, he did not at the time of delivery subject himself to the liabilities of the borrower of a sovereign, so also I think that he is not entitled to the privileges attending the lawful possession of a borrowed sovereign. When he discovered that the coin was a sovereign, he was I think bound to elect, as a finder would be, whether he would assume the responsibilities of a possessor; but at the moment when he was in a position to elect, he also determined fraudulently to convert the sovereign to his own use; and I am therefore of opinion that he falls within the principle of Regina *v.* Middleton, L. Rep. 2 C. C. 45, and was guilty of larceny at common law. For these reasons I am of opinion that the conviction was right.

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[Opinions were also delivered by Lord Coleridge, C. J., and Mathew, Stephen, Hawkins, Manisty, Field, and Denman, JJ.]

REGINA *v.* FLOWERS,

16 Cox C. C. 33 [1886].

Case reserved by the learned Recorder for the borough of Leicester, at the last Epiphany Quarter Sessions for that borough, upon the trial of an indictment which charged one Charles Flowers with having, on the 31st day of October, 1885, while being servant to one Samuel Lennard and another, feloniously stolen, taken, and carried away certain money to the amount of seven shillings and one penny halfpenny, the property of the said Samuel Lennard and another, his masters.

It appeared from the case that the prisoner had been for about three months next preceding the 31st day of October, 1885, a clicker in the service of Messrs. Lennard Brothers, a firm of shoe manufacturers in Leicester, in whose establishment the following mode of payment of the wages of their employees was adopted, namely: —

The amount of wages due to each workman was calculated from the time book and entered in the wages book. Each amount was then made up and put into a small paper bag, which was then sealed; and the bags so secured were sent to the various rooms in which the men worked. The foreman of each of such rooms then distributed the bags containing the wages among the men under his charge. When a mistake occurred the workman affected thereby took his bag to one Francis Cufflin (the clerk) to have the mistake rectified.

On the 31st day of October there was due to the prisoner the sum of sixteen shillings and eight pence, and after the workmen had been paid their wages the prisoner came to Cufflin and said that he was three pence short, and gave him the bag into which his money had been put. The top of the bag had been torn off, and the bag was empty. Another workman named Jinks had also come to Cufflin for a correction in his money, stating that fivepence or sixpence was due to him, and had handed to Cufflin his bag with seven shillings and eleven pence halfpenny in it. Cufflin thereupon gave the prisoner by mistake Jinks's bag, and also three pence in copper, into his hand, and the prisoner, having received Jinks's bag, went away immediately, and in the presence of one of his fellow-workmen emptied the contents of Jinks's bag into his hand, saying, "The biter has got bit; he has paid me double wages." He then turned to another man and said, "Come on, we'll go and have a drink on it."

At the close of the case for the prosecution, it was submitted on behalf of the prisoner that there was no case to go to the jury, as the evidence failed to show that the prisoner at the time he received the

seven shillings and eleven pence halfpenny from Cufflin had the *animus furandi*, or guilty mind, essential to constitute the offence of larceny, and that any subsequent fraudulent appropriation of the money by the prisoner was immaterial in so far as the offence of larceny was concerned.

The learned Recorder, however, held that there was evidence to go to the jury of the prisoner having the *animus furandi* at the time he received from Cufflin the money, and he also ruled, in deference to the opinion of certain of the learned judges in Regina *v.* Ashwell, 53 L. T. Rep. N. S. 773; 16 Cox C. C. 1; 16 Q. B. Div. 190; 55 L. J. 65, M. C., that if the prisoner received the money innocently but afterwards fraudulently appropriated it to his own use, he was guilty of larceny. Having directed the jury to this effect, he put to them the following questions, namely: —

1. Did the prisoner, from the time he received from Cufflin the bag containing the seven shillings and eleven pence halfpenny, know that it did not belong to him? To this the jury answered, No.

2. Did the prisoner, having received the bag and its contents innocently, afterwards fraudulently appropriate them to his own use? And to this the jury answered, Yes.

The learned Recorder thereupon directed a verdict of guilty to be entered on the first count of the indictment, which was that above set out, and reserved the question for the consideration of this court whether, the jury not having found affirmatively that the prisoner had the *animus furandi* at the time he received the seven shillings and eleven pence halfpenny from Cufflin, he could be rightly convicted of larceny by reason of the subsequent fraudulent appropriation by him of the said money to his own use.

No one appeared on behalf of the prosecution or the prisoner.

Lord Coleridge, C. J. This case might have raised a very subtle and interesting question. The manner in which the learned Recorder has stated it, however, raises a question which is distinguishable from that which was raised in the case of Regina *v.* Ashwell. Now, in that case, the judges who decided in favor of the conviction never meant to question that which has been the law from the beginning, and to hold that the appropriation of chattels which had previously been innocently received should amount to the offence of larceny. If that case is referred to, it will be seen that I myself assumed it to be settled law that where there has been a delivery of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larceny except by statute. In the present case, however, the learned Recorder appears to have directed the jury that, if the prisoner received the

7*s.* 11½*d.* innocently, but afterwards fraudulently appropriated the money to his own use, he was guilty of larceny. But no such rule was intended to be laid down in Regina *v.* Ashwell, and the direction of the learned Recorder was not, in my opinion, in accordance with that decision. It is quite possible for the jury to have considered consistently with that direction that a fraudulent appropriation, six months after the receipt of the money, would justify them in finding the prisoner guilty of larceny. The question we are asked is, whether the jury not having found affirmatively that the prisoner had the *animus furandi* at the time he received the money, he was rightly convicted of larceny by reason of the subsequent fraudulent appropriation. In my opinion he was not. The judgments of those judges who affirmed the conviction in Regina *v.* Ashwell, if carefully read, show that they considered that to justify a conviction for larceny there must be a taking possession simultaneously with the formation of the fraudulent intention to appropriate, and that was not the case here.

MANISTY, J. I am of the same opinion. The difference of opinion among the judges who decided the case of Regina *v.* Ashwell was in the application to the particular facts in that case of the settled principle of law that the innocent receipt of a chattel, coupled with the subsequent fraudulent appropriation of that chattel, does not amount to larceny. And while certain of the judges were of opinion that there had been a fraudulent taking and not an innocent receipt and held that Ashwell had been guilty of larceny, the others, on the contrary, were of opinion that there had been an innocent receipt, and that therefore there had been no larceny. I am glad to think that the old rule of law remains unaffected.

HAWKINS, J. The old rule of law was not questioned by any of the judges in Regina *v.* Ashwell. This case is distinguishable, for here the learned Recorder told the jury that if the prisoner received the 7*s.* 11½*d.* innocently but afterwards fraudulently appropriated that money to his own use, he was guilty of larceny. It appears clear to me that that direction could not be right, and that the learned Recorder misapprehended the rule of law.

DAY, J. I was one of those who dissented from affirming the conviction in Regina *v.* Ashwell and have only to add that, in my opinion, this conviction cannot be supported.

GRANTHAM, J. I am of the same opinion.

Conviction quashed.

REGINA *v.* REED,[1]

23 L. J. N. S. M. C. 25 [1853].

CROWN CASE RESERVED.

At the General Quarter Sessions of the Peace, for the County of Kent, holden at Maidstone on the 4th of January, 1853, Abraham Reed was tried upon an indictment for feloniously stealing 2 cwt. of coals, the property of William Newton, his master, on the 6th of December, 1852, and James Peerless was charged in the same indictment with receiving the coals, knowing the same to have been stolen and was acquitted.

The evidence of the prosecutor, William Newton, was as follows: I am a grocer and miller at Cowden and sell coals by retail. The prisoner Reed entered my service last year, about three weeks before the 6th of December. On that day I gave him directions to go to a customer to take some flour and thence to the station at Edisbridge for 10 cwt. of coals. I deal with the Medway Company, who have a wharf there, Holman being wharfinger. I told Reed to bring the coals to my house. Peerless lives about five hundred yards out of the road from the station to my house. Reed went about 9 A. M. and ought to have come back between 3 and 4 P. M., but as he had not come back I went in search of him at half-past 6 and found him at Peerless's. The cart was standing in the road opposite the house, and the two prisoners were taking coals from the cart in a truck-basket. It was dark. I asked Reed what business he had there; he said to deliver half a hundredweight for which he had received an order from Peerless. Reed had never before told me of such an order and had no authority from me to sell coals. Later that evening I went and asked Peerless what coals he had received from my cart; he said half a hundredweight. I asked him how they were carried from the cart. He said in a sack. I weighed the coals when brought home and found the quantity so brought 7¼ cwt. and 4 lb. I went to Peerless's next day and found some coals there, apparently from half a hundredweight to three quarters. Upon his cross-examination he stated as follows: I believe Peerless had sometimes had coals from me. When I came up they were shutting the tail of the cart, but some coals were in a truck-basket at their feet. Reed said at once that he had received an order from

[1] *Coram* Lord Campbell, C. J., Jervis, C. J., Pollock, C. B., Parke, B., Coleridge, J., Maule, J., Erle, J., Platt, B., Williams, J., and Talfourd, J.

Peerless. It was two hours later when I asked Peerless and when he said he had ordered them. Reed said he had carried 2 cwt. in, but that was two hours after. On his re-examination he said I think Peerless had had some coals from me about a fortnight before the 6th. James Holman, another witness for the prosecution, said: I am wharfinger to the Medway Company at the Edisbridge Station and Newton deals there for coals. Reed came on the 6th of December and asked for half a ton for Newton and I supplied him. I entered them at the time to Newton, and now produce the book with the entry. Newton was then re-examined and said: Reed came to me on the morning of the 7th. I told him $2\frac{3}{4}$ cwt. were missing. He then said one sack had been left at the wharf by mistake. I therefore charged him with only three quarters of a hundredweight. Holman upon re-examination said Reed left a sack behind him but it was an empty one.

This being the case for the prosecution, *Mr. Ribton*, counsel for the prisoner, submitted that there was no case to go to the jury on the charge of larceny, inasmuch as the possession of the coals left at Peerless's had never been in Newton, the master.

Mr. Rose, counsel on the part of the prosecution, contended that the coals were constructively in the possession of Newton and that the offence was properly charged as larceny; but that under the provisions of the Act 14 & 15 Vict. c. 100, § 13, it was immaterial whether the offence was larceny or embezzlement, as the jury might find a verdict either for larceny or embezzlement. *Mr. Ribton* then proposed that it should be left to the jury as a charge of embezzlement, but to this *Mr. Rose* objected on the ground that the receiver must then be acquitted.

The Court was of opinion that there was constructive possession in the master, and left the case to the jury as a case of larceny upon the evidence, who thereupon found the prisoner Abraham Reed guilty.

Mr. Ribton then applied to the Court to submit the case for the Court of Criminal Appeal, contending that the conviction was wrong in law, as if any offence had been committed it was embezzlement and not larceny. The Court acceded to the application and respited judgment, and discharged Reed upon his entering into recognizances himself in £20 and one surety in £20 to receive judgment at the next Court of Quarter Sessions for Kent.

The case was argued originally (April 23, 1853) before JERVIS, C. J., PARKE, B., ALDERSON, B., WIGHTMAN, J., and CRESSWELL, J.; but as their Lordships did not agree it was directed to be re-argued before all the judges.

. . . . . .

Lord Campbell, C. J. I am of opinion that the prisoner has been properly convicted of larceny. There can be no doubt that in such a case the goods must have been in the actual or constructive possession of the master, and that if the master had no otherwise the possession of them than by the bare receipt of his servant upon the delivery or care of them for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet in respect of the servant himself this will not support a charge of larceny; because as to him there was no tortious taking in the first instance and consequently no trespass. Therefore if there had been here a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement and not of larceny. But if the servant had done anything which determines his original exclusive possession of the goods so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have therefore to consider whether the exclusive possession of the coals continued with the prisoner down to the time of the conversion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart in the same manner as if they had been deposited in the prosecutor's cellar, of which the prisoner had the charge. The prosecutor was undoubtedly in possession of the *cart* at the time when the coals were deposited in it; and if the prisoner had carried off the cart *animo furandi* he would have been guilty of larceny. Robinson's Case.[1] There seems considerable difficulty in contending that if the master was in possession of the cart he was not in possession of the coals which it contained, the coals being his property and deposited there by his order for his use. *Mr. Ribton* argued that the goods received by a servant for his master remain in the exclusive possession of the servant till they have reached their "*ultimate destination;*" but he was unable, notwithstanding his learning and ingenuity, to give any definition of "ultimate destination" when so used. He admitted that the master's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider that the point

[1] 2 East, P. C. 565.

of time to be regarded is that when the coals were deposited in the cart. Thenceforth the prisoner had only the custody or charge of the coals as a butler has of his master's plate or a groom of his master's horse. To this conclusion I should have come upon principle; and I think that Spears's Case is an express authority to support it. The following is an exact copy of the statement of that case signed by Buller, J., in pp. 182, 183 of the 2d volume of the Black Book, containing the decisions of the judges in Crown cases and deposited with the Chief Justice of the Queen's Bench for the time being: "John Spears was convicted before me at Kingston for stealing forty bushels of oats of James Brown & Co., in a barge on the Thames. Brown & Co. sent the prisoner with their barge to Wilson, a corn-meter, for as much oats as the barge would carry, and which were to be brought in loose bulk. The prisoner received from Wilson 220 quarters in loose bulk and five quarters in sacks; the prisoner ordered this quantity to be put into sacks. The quantity in the sacks was afterwards embezzled by the prisoner; and the question reserved for the opinion of the judges is whether this was felony, the oats never having been in the possession of the prosecutor, or whether it was not like the case of a servant receiving change or buying a thing for his master but never delivering it. F. Buller.

"*Vide* Dyer 5 and 1 Shower, 52.

"April 25, 1798.

"*Conviction proper.*"

The question arose whether the corn, while in the prosecutor's barge, in which it was to be brought to the prosecutor's granary, was to be considered in the possession of the prosecutor; and the judges unanimously held that from the time of its being put into the barge it was in the prosecutor's possession, although the prisoner had the custody or charge of it. That case has been met at the bar by a suggestion that the whole cargo of corn, of which the quantity put on board the barge was a part, was or might have been purchased by the prosecutor so that he might have had a title and a constructive possession before the delivery to the prisoner. But the very statement of the case in the Black Book and the authorities there referred to show that the judges turned their attention to the question whether the exclusive possession of the servant had not been determined before the conversion; and during the argument of The King *v.* Walsh we have the *ratio decidendi* in Spears's Case explicitly stated by one of the judges who concurred in the decision, Heath, J.: "That case went upon the ground that the corn was in the prosecutor's barge, *which was the same thing as if it had been in his granary.*" Read "cart" for "barge," "coals" for "corn," and "cellar" for "granary," and the two cases are for this purpose pre-

cisely the same. There is no conflicting authority, for in all the cases relied upon by *Mr. Ribton* the exclusive personal possession of the prisoner had continued down to the wrongful conversion. It is said that there is great subtlety in giving such an effect to the deposit of the coals in the prosecutor's cart; but the objection rests upon subtlety wholly unconnected with the moral guilt of the prisoner, for as to that it must be quite immaterial whether the property in the coals had or had not vested in the prosecutor prior to the time when they were delivered to the prisoner. We are to determine whether this would have been a case of larceny at common law before there was any statute against embezzlement; and I cannot think that there would have been any reproach to the administration of justice in holding that the subtlety arising from the prosecutor having had no property in the subject of the larceny before its delivery to the prisoner who stole it, was sufficiently answered by the subtlety that when the prisoner had once parted with the personal possession of it so that a constructive possession by the prosecutor began, the servant who subsequently stole it should be liable to be punished, — as if there had been a prior property and possession in the prosecutor; and that the servant should be adjudged liable to be punished for a crime instead of being allowed to say that he had only committed a breach of trust, for which he might be sued in a civil action. In approaching the confines of different offences created at common law or by statute, nice distinctions must arise and must be dealt with. In the present case it is satisfactory to think that the ends of justice are effectually gained by affirming the conviction, for the only objection to it is founded upon an argument that the prisoner ought to have been convicted of another offence of the same character, for which he would have been liable to the same punishment.

PARKE, B. Now that the facts of Spears's Case have been ascertained I consider myself bound by the authority of that decision to say that the prisoner was guilty of larceny.

The other judges concurred.

Conviction affirmed.

CHAPTER XXIII.

LARCENY.

SUBJECTS OF LARCENY.

SECTION 1. ARTICLES PART OF THE REALTY.

REX v. RICHARDS,

RUSS. AND RY. C. C. 28 [1802].

THE prisoners were tried before Mr. Sergeant Best, at the Lent Assizes for the County of Hertford, in the year 1802, on an indictment on the 4 G. II. c. 32,[1] charging them, in the first count, with stealing, on the 25th of February, 1802, at Abbott's Langley, five hundred pounds weight of lead of the value of £5, belonging to Thomas Villiers Hyde, Earl of Clarendon, fixed in a certain outlet belonging to his dwelling-house, against the statute, etc.

The second count stated that the lead was fixed in an outlet belonging to a certain building called the Temple of Pan.

The third count, that it was fixed in an outlet belonging to a certain building.

The fourth, fifth, and sixth counts were the same as the above, only stating that the lead was fixed in a garden instead of an outlet.

It appeared on the trial that the lead stolen consisted of three images, which, at the time they were taken by the prisoners, were standing on three pedestals, to which they were fastened with irons, and the pedestals were fixed in the ground.

The images were standing near a brick building called the Temple of Pan, which was erected in an enclosed field belonging to the Earl of Clarendon, about half a mile from his dwelling-house and without his lordship's park pales, from which it was separated by a public road.

The Temple of Pan was occasionally used by Lord Clarendon as a

[1] By which it is enacted, That every person who shall steal, rip, cut, or break, with intent to steal, any lead, iron bar, iron gate, iron palisado, or iron rail whatsoever, being fixed to any dwelling-house, outhouse, coach-house, stable, or other building used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet belonging to any dwelling-house or other building, shall be deemed to be guilty of felony.

tea-drinking place. The building had doors and windows, which were kept shut when the family of Lord Clarendon were not using it; the doors opened into the place where the images stood. The only other building within the inclosure was an open building, which was once a barn, but it was then only used as a coach-house when the family came to the Temple of Pan.

The jury, on very clear evidence, found both prisoners guilty; but judgment was respited, in order to take the opinion of the judges on the question, whether the stealing of lead, situate as these images were, was felony.

In Easter term, on the 5th of May, 1802, all the judges met at Lord Ellenborough's chambers, when the conviction was held wrong, this being no outlet or garden belonging to any house or building.

FERENS *v.* O'BRIEN,

11 Q. B. D. 21 [1883].

Case stated by justices under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

At the hearing of an information before two justices of the county of Durham, charging the respondent with having feloniously stolen, taken, and carried away two buckets of water, the property of the appellants, and of the value of 1*d.*, it was proved that the appellants were the owners of a colliery in the county of Durham, which was supplied with water by the Weardale and Shildon Water Company, Limited; that the colliery being out of the district in which the water company were authorized to supply water by their Act of Parliament, a meter was placed upon the water company's ground, and the water was brought from the meter to the colliery by means of underground pipes laid down by the appellants; that the water was then supplied to houses occupied by the appellants' workmen by means of branch pipes to which taps were attached, the workmen being allowed to take water from the taps on payment of a fixed price; and that the respondent was seen to take the water in question from one of the taps without having agreed to pay for the same.

The respondent having pleaded "not guilty" and desired to be dealt with summarily, the justices declined to convict her of the offence charged.

The question of law for the opinion of the Court was whether or not water could be the subject of larceny at common law.

E. Ridley, for the appellants, was not required to argue.

Granger, for the justices, contended that water could not be the subject of larceny at common law, and that this contention was supported by the fact that the legislature had thought it necessary to impose statutory penalties for the taking of water from pipes belonging to water companies by 10 & 11 Vict. c. 17, § 59, amended by 26 & 27 Vict. c. 93, § 16.

The Court (FIELD and MATHEW, JJ.) were of opinion that water, under the circumstances and in the condition described in the case, could be the subject of a larceny at common law, and they directed the case to be remitted to the justices with a statement of this opinion.

Case remitted.

REGINA v. EDWARDS,

13 Cox C. C. 384 [1877].

COURT OF CRIMINAL APPEAL.

THE prisoners were tried at the West Kent Quarter Sessions, held at Maidstone, on the 5th of January, 1877, on an indictment charging them with stealing three dead pigs, the property of Sir William Hart Dyke, Bart.

The evidence was to the following effect: The three pigs in question having been bitten by a mad dog, Sir William Hart Dyke, to whom they belonged, directed his steward to shoot them. The steward thereupon shot them each through the head and ordered a man named Paylis to bury them behind the barn. The steward stated that he had no intention of digging them up again or of making any use of them. Paylis buried the pigs, pursuant to directions, behind the barn on land belonging to Sir William Hart Dyke, in a place where a brake stack is usually placed. The hole in which the pigs were buried was three feet or more deep, and the soil was trodden in over them.

The prisoner Edwards was employed to help Paylis to bury the pigs. Edwards was seen to be covering the pigs with brakes, and in answer to Paylis's question why he did so, said that it would keep the water out, and it was as well to bury them "clean and decent."

The two prisoners went the same evening and dug up the pigs, and took them to the railway station, covered up in sacking, with a statement that they were three sheep, and sent them off for sale to a salesman in the London Meat Market, where they were sold for £9 3*s.* 9*d.*, which was paid to the prisoners for them.

The counsel for the prisoners submitted that there was no evidence

in support of the charge to go to the jury on the following grounds: Firstly, that the property was not proved as laid in the indictment, as Sir William Hart Dyke had abandoned his property in the pigs; secondly, that under the circumstances the buried pigs were of no value to the prosecutor; and, thirdly, that under the circumstances the buried pigs were attached to the soil, and could not be the subject of larceny.

The Chairman, however, thought that the case was one for the jury, and directed them as to the first point that in his opinion there had been no abandonment, as Sir William's intention was to prevent the pigs being made any use of; but that if the jury were of opinion that he had abandoned the property they should acquit the prisoners. He also told the jury that he thought there was nothing in the other two objections.

The jury found the prisoners guilty.

The question for the consideration of the Court is, whether, having reference to the objections taken by prisoners' counsel there was evidence on which the jury were justified is convicting the prisoners of larceny.

If the answer to this question be in the negative, then the conviction to be quashed, otherwise affirmed.

No counsel appeared to argue on either side.

By the COURT: *Conviction affirmed.*

HOSKINS *v.* TARRANCE.

5 BLACKF. 417 [1840].

APPEAL from the Montgomery Circuit Court.

DEWEY, J. This was an action of slander. The words laid in the declaration to have been spoken by the defendant of the plaintiff, among others, are, "He broke into my room and stole the key." Plea, not guilty. Verdict and judgment for plaintiff. There was evidence that the defendant said of the plaintiff, "He broke into a room of my house and stole the key out of the door." The defendant moved the Court to instruct the jury, "That the key in the lock of the door of a house, and belonging thereto, is part of the realty, and not the subject of larceny, unless the same is first severed from the realty by one act and then stolen by another and distinct act." The Court refused the charge.

This refusal gives rise to a question not free from technical difficulties. It was anciently decided in England that charters and other assurances of real estate, and the chest in which they were kept,

savored so much of the realty that they could not be the subjects of theft. But it was held in a later case that a window-sash not hung or beaded into the frame but fastened there by laths nailed across so as to prevent it from falling out, was the subject of larceny. Rex *v.* Hedges, 1 Leach C. C. 201. It is not easy, on principle, to reconcile these decisions. The latter case turned on the point that the temporary fastening of the window-sash did not make it a fixture. Certainly title papers and the trunk which contains them are not fixtures. They are as removable as any kind of personal property. But such papers descend to the heir or pass to the purchaser of the estate to which they belong. There is good reason why they should do so; the safety of titles, of which they are the evidence, requires it. But would not the window-sash have taken the same course in the event of a descent cast, or alienation, of the house to which it was attached? We see no necessary or reasonable connection between the rule that title papers shall pass with the estate and the principle which has been made to exclude them from the possibility of being feloniously stolen. Indeed, the spirit of that very rule — having the security of title for its object — is violated by withholding from the evidences of title the protection of criminal justice. If all the technical consequences of considering charters and deeds as a part of the real estate were to be carried out, their owner, if dispossessed, would be obliged to resort to an action of ejectment or writ of right to recover them, — a conclusion scarcely more absurd than the doctrine that they cannot be the subjects of larceny, which is itself nothing but a technical deduction, and not very fairly drawn, from the premises assumed as its foundation. There are certainly various purely personal chattels which at common law go to the heir, with regard to which theft may be committed, namely, some species of heirlooms, and things in the nature of heirlooms — such as carriages, tables, utensils, and furniture, coat-armor, and pennons, etc. On the contrary, there are things which go to the executor, the taking of which with whatever intent is but trespass and not larceny. Emblements not severed from the ground are of this character. But reasoning analogous to that which excludes charters and deeds, though they have no actual connection with the freehold, from being the subjects of larceny — because they pass with the real estate — would include within those subjects emblements, for they follow the personalty, though they are attached to the soil.

It is true that the keys of a house follow the inheritance; and the writers who lay down this doctrine make no distinction between keys in the lock and those in the pockets of their owners. They are nevertheless not fixtures, but personal property, which from a rule of law founded on public convenience like title papers go with the land. And

as no decision, so far as we know, has as yet ranked them among the articles upon which larceny cannot be committed, and as we see no good reason for carrying the doctrine of exemption farther than it has already gone, we feel at liberty, upon the authority of Rex *v.* Hedges, *supra,* as well as on principle, to decide that as "personal goods" they are within the purview of our statute relative to crime and punishment, and are the subjects of theft. Rev. Sts. 1838, p. 207.

The Circuit Court committed no error in refusing the instruction to the jury which was asked for by the defendant.

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Section 2. Deeds Savoring of the Realty.

REX *v.* WESTBEER,

1 Leach C. C. 14 [1739].

At the Old Bailey, January Session, 1739, Thomas Westbeer was indicted before Lord Chief Baron Comyns and Mr. Justice Chapple for stealing a parchment writing, purporting to be a commission, dated in the reign of Queen Anne, empowering the Commissioners therein named (pursuant to an order which had been previously made in Chancery, in a cause between Lord Chesterfield and John Cantrell and others) to enter and ascertain the boundaries of the manors of Bradbury and Hartsherne and to certify how high the water of Furnace Pool ought to be kept, etc.; and also one other parchment writing, purporting to be a return made to the said commission. The property was laid to be the goods of our sovereign lord the King, and of the value of four shillings.

. . . . . .

The Court, upon hearing the evidence, expressed a doubt whether the offence amounted to felony. The jury therefore found a special verdict, "That the prisoner was guilty of privately taking away a parchment writing, value one penny, from the records in the Court of Chancery, purporting to be a commission under the broad seal; and another parchment writing annexed thereto, value one penny, purporting to be the return to the said commission, with intent to steal the same; that they were the goods of the King; and that the cause of which they were the records was finally determined in the year 1717."

In Trinity term, 1740, this special verdict and the indictment were removed by *certiorari* into the Court of King's Bench. Three objections were raised on the part of the prisoner: First, that it was a false conclusion of the jury that these parchments were the goods of the King; secondly, that being records, the indictment ought to have

been on 8 Hen. VI. c. 12, § 3,[1] which introduces an entire new law; thirdly, that they concerned the realty, and could not become the subjects of larceny, from their constructive adherence to, and connection with, the freehold.

This case was twice argued at the Bar; but the two first points were very slightly spoken to and not much relied upon. On the third point it was argued on the part of the Crown that these parchment writings were neither chattels real nor choses in action; and the only question would be, whether they could be construed to be charters concerning the inheritance. The reason given by Mr. Serjeant Hawkins[2] why a felony cannot be committed of these things is, because, "being of no use but to the owner, they are not supposed to be so much in danger of being stolen and therefore need not be provided for in so strict a manner as those things which are of a known price, and everybody's money." But the present parchments are not of that description, for the jury have affixed such a value to them as will make the offence petty larceny. For charters which concern the realty, the heir may bring his action, but for these records no such action will lie. The case in the Year Book[3] from which this distinction is drawn, says that felony cannot be committed of charters which concern the realty, because they cannot be valued; but a value has been here affixed, and it is well known that for certain purposes old parchments will sell for a considerable price. It is clear that the relation to the realty does not alone create the exemption, for there is no doubt but it would be felony to steal an heir-loom, and yet that favors of the realty.

It was admitted by the counsel for the prisoner that the parchment writings were neither chattels real nor choses in action; but it was contended that as they related to the boundaries of manors and the right of water, they were charters which concerned the realty; for what can affect the inheritance more than the right of water and the boundaries of a manor? It is true, perhaps, that the heir could not

[1] [III. And moreover it is ordained, That if any record, or parcel of the same writ, return, panel, process, or warrant of attorney in the King's courts of chancery, exchequer, the one bench or the other, or in his treasury, be willingly stolen, taken away, withdrawn, or avoided by any clerk, or by other person, because whereof any judgment shall be reversed; that such stealer, taker away, withdrawer, or avoider, their procurators, counsellors, and abettors, thereof indicted, and by process thereupon made thereof duly convict by their own confession, or by inquest to be taken of lawful men, whereof the one half shall be of the men of any court of the same courts, and the other half of other, shall be judged for felons, and shall incur the pain of felony. And that the judges of the said courts of the one bench or of the other, have power to hear and determine such defaults before them, and thereof to make due punishment as afore is said.]

[2] [1 Hawk. P. C. 142.]

[3] [10 Edw. 4, pl. 14.]

maintain an action to recover them, because they are of that nature which are called *nullius in bonis*, and every man has an equal right to resort to them. They are in the possession of the Crown, as being public records, but it does not follow from thence that they are the property of the King.

The Court gave no opinion whether these were properly laid to be the goods of the King, nor whether the law as to this case was altered by 8 Hen. VI. c. 12; but they were unanimously of opinion that these parchment writings concerned the realty, and that therefore the prisoner was not guilty of the felony charged in the indictment.

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Section 3. Choses in Action.

REGINA *v.* POWELL,

5 Cox C. C. 396 [1852].

COURT OF CRIMINAL APPEAL.

The following case was stated by Talford, J.: —

William Powell was tried before me at the last assizes for Brecon on an indictment charging him with burglariously breaking and entering the dwelling-house of David Williams in the night time, with intent to steal goods and chattels therein.

The prisoner in 1843 borrowed of David Williams the sum of £600 and executed to him a mortgage in fee of freehold land, and in the year 1848 he borrowed of Williams the further sum of £200 and executed another mortgage by way of further charge on the same land. Both deeds contained the provisos of redemption and covenants for the payment of the principal and interest of the sums advanced. Williams, the mortgagee, brought an action of debt against the prisoner for the recovery of these sums remaining unpaid, which was pending and approaching trial when the burglary was committed.

The evidence proved that the prisoner committed the burglary in order to steal the mortgage securities; and in answer to a question put to the jury by me, after they had delivered a verdict of guilty, they stated that the offence was committed with intent to steal the mortgage-deeds. In a bundle with the first deed, which had been kept in a drawer ransacked on the night of the burglary, was a satisfied and cancelled bond of a former mortgage belonging to Williams the mort-

gagee, and which was also afterwards kept with both mortgage-deeds; but these were, in fact, at the office of the mortgagee's attorney when the burglary was committed.

On the part of the prisoner it was objected that the intent was not properly alleged in the indictment, as though the mortgage-deeds might be the subject of statutable larceny, as "valuable securities," they were not goods and chattels. I overruled the objection, thinking that the mortgage-deeds being substantially securities for debts and containing covenants to pay principal and interest, were distinguishable from deeds, which as "savoring of the realty" were not the subjects of larceny at common law, and that the parchments on which the covenants were inscribed were chattels, if indeed the words "goods and chattels" might not be rejected as surplusage.

The prisoner was sentenced to ten years' transportation, but doubts having been suggested if he was properly convicted on the objection as applied to the facts, I present this case for the judgment of the Court of Criminal Appeal. The prisoner remains in this country under his sentence. The counsel for the prosecution also relied on the satisfied bond as, at all events, the subject of larceny.

The question for the Court is whether the conviction is right.

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JERVIS, C. J., now delivered the judgment of the Court. After reading the case, his lordship said: The case assumes that the prisoner broke and entered the house, with intent to steal the mortgage-deeds, they being securities for money. It is therefore quite unnecessary to deal with the question whether mortgage-deeds, containing covenants to pay, are distinguishable from deeds savoring of the realty, because securities for money are not goods and chattels. Calye's case,[1] 8 Rep. 33 *a*; Chanell *v.* Robotham,[2] Yelv. 68. The case of R. *v.* Vyse, 1 Moody C. C. 218, was different; the notes had been paid; they had become mere paper and stamps, the property of the prosecutor, and were therefore his goods and chattels. In this case, the mortgage securities were not satisfied. We therefore think that the conviction was wrong.

Conviction reversed.

[1] In Calye's case it is said: "Which words (*bona et cattalla*) do not of their proper nature extend to charters, and evidences concerning freehold or inheritance, or obligations, or other deeds or specialties, being things in action."

[2] In Chanell *v.* Robotham, which was an action of trespass for taking goods and chattels, it was held that the plaintiff was not entitled to recover a bond or the value of it under that description.

SECTION 4. WRITTEN PAPER OR PARCHMENT NOT SAVORING OF THE REALTY, AND NOT CONTAINING OPERATIVE CHOSES IN ACTION, AND THEREFORE, VIEWED AS MERE PIECES OF PAPER OR PARCHMENT, AND SO, AS "GOODS AND CHATTELS."

REX *v.* WALKER,[1]

1 MOODY C. C. 155 [1827].

THE prisoner was tried before Newman Knowllys, the Recorder, at the September Sessions at the Old Bailey in the year 1826, for grand larceny.

The indictment consisted of eight counts. The first count charged him with stealing, on the 9th of October, in the Inner Temple, one roll of parchment, being records of the Court of Common Pleas at Westminster and containing remembrances and rolls of the said court and dockets of causes entered of record in the said court, value ten shillings, the property of our lord the King.

The second count was the same as the first, except laying the property to be in the four judges of the Court of Common Pleas by their respective names and offices.

The third count was the same as the first, except laying the property in the three prothonotaries of the said court by their respective names and offices.

The fourth count was the same as the first, except laying the property in Thomas Sherwin.

. . . . . .

The facts to prove the stealing were clear; and the jury found the prisoner guilty on the first four counts.

. . . . . .

In Hilary term, 1827, the JUDGES met and considered this case, and held, that as the records did not concern the realty, as was the case in R. *v.* Westbeer,[2] stealing the parchment was larceny, and the conviction therefore right.

[1] [The offence was committed prior to the passage of the Statute 7 & 8 Geo. IV. c. 29, § 21 of which provides specifically for the larceny of records, and the case therefore proceeds upon the common law.]

[2] [1 Leach C. C. 13, above p. 242.]

REGINA *v.* WATTS,

4 Cox C. C. 336 [1850].

COURT OF CRIMINAL APPEAL.

. . . . . .

WILDE, C. J., now delivered the judgment of the Court. We have considered this case and we are all of opinion that the counts in the indictment which charge the stealing a piece of paper, the property of Goldsmid and others the masters of the prisoner, are supported by the evidence. By the statement of the case it appears that Goldsmid and others are the directors of the company and that by its constitution they have the appointment and dismissal of the servants in the employ of the society; that they fix and pay their salaries and also fix the duties which they are to perform. The prisoner was a salaried clerk in the office and therefore he was their servant. They have also the ultimate charge and custody of the documents of the company, and by the course of business between the company and its bankers the paid checks, which are part of the company's documents, are returned to the directors and become the vouchers of the directors; as such directors they were entitled to the paper in question as one of those. One of the prisoner's appointed duties was to receive and keep for his employers such returned checks; any such paper in his custody would be in the possession of his employers. The paper in question, therefore, as soon as it had passed from the hands of the messenger and arrived at its ultimate destination (the custody of the prisoner for the directors) was really in their possession; and when he afterwards abstracted it for a fraudulent purpose he was guilty of stealing it from them, as a butler who has the keeping of his master's plate would be guilty of larceny if he should receive plate from the silversmith for his master at his master's house, and afterwards fraudulently convert it to his own use before it had in any other way than by his act of receiving it come to the actual possession of the master. This case is distinguishable from those in which the goods have only been in the course of passing toward the master, as in Regina *v.* Masters, where the prisoner's duty was only to receive the money from one fellow-servant and pass it on to another, who was the ultimate accountant to the master. Here the paper had reached its ultimate destination when it came to the prisoner's keeping, and that keeping being for his masters made his possession theirs. In this view of the case no difficulty arises

as to the part ownership from the fact that the prisoner was a shareholder in the company. As such he had no property in this paper.

Conviction affirmed.

Section 5. Animals Feræ Naturæ.

REX *v.* SEARING,

Russ. & Ry. 350 [1818].

The prisoner was tried before Mr. Baron Wood at the Lent Assizes for Hertfordshire in the year 1818 for larceny in stealing "five live tame ferrets confined in a certain hutch," of the price of fifteen shillings, the property of Daniel Flower.

The jury found the prisoner guilty; but on the authority of 2 East, P. C. 614, where it is said that ferrets (among other things) are considered of so base a nature that no larceny can be committed of them, the learned judge respited the judgment until the opinion of the judges could be taken thereon.

It appeared in evidence that ferrets are valuable animals, and those in question were sold by the prisoner for nine shillings.

In Easter term, 1818, the Judges met and considered this case; they were of opinion that ferrets (though tame and salable) could not be the subject of larceny and that judgment ought to be arrested.[1]

MULLALY *v.* PEOPLE,

86 N. Y. 365 [1881].

Error to the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 20, 1881, which affirmed a judgment of the Court of General Sessions in and for the

[1] ["6. Larceny cannot be committed in some things whereof the owner may have a lawful property and such whereupon he may maintain an action of trespass in respect of the baseness of their nature, as mastiffs, spaniels, gray-hounds, blood-hounds, or of some things wild by nature yet reclaimed by art or industry, as bears, foxes, ferrets, etc., or their whelps or calves, because though reclaimed they serve not for food but pleasure, and so differ from pheasants, swans, etc., made tame, which, though wild by nature, serve for food.

"Only of the reclaimed hawk, in respect of the nobleness of its nature and use for princes and great men, larceny may be committed if the party know it to be reclaimed. 1 Hale P. C. 511."]

county of New York, entered upon a verdict convicting the plaintiff in error of the crime of petit larceny in stealing a dog.

. . . . . .

EARL, J. The prisoner was convicted of stealing a dog of less value than $25. His counsel contended at the trial and has argued before us that stealing a dog is not larceny, and whether it is or not is the sole question for our present determination.

The learned opinion pronounced at the general term leaves but little to be written now. At common law the crime of larceny could not be committed by feloniously taking and carrying away a dog. Wharton's Cr. Law [4th ed.], § 1755; 4 Black Com. 235; 1 Hale's Pleas of the Crown, 510; Coke's Third Inst. 109. And yet dogs were so far regarded as property that an action of trover could be brought for their conversion, and they would pass as assets to the executor or administrator of a deceased owner. Bacon's Abr., Trover, D.; 1 Wms. on Ex'rs, [6th Am. ed.] 775.

The reason generally assigned by common-law writers for this rule as to stealing dogs is the baseness of their nature, and the fact that they were kept for the mere whim and pleasure of their owners. When we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history (2 Motley's Dutch Republic, 398); and the faithful St. Bernards, which after a storm has swept over the crests and sides of the Alps start out in search of lost travellers, the claim that the nature of a dog is essentially base, and that he should be left a prey to every vagabond who chooses to steal him, will not now receive ready assent.

In nearly every household in the land can be found chattels kept for the mere whim and pleasure of the owner, a source of solace after serious labor, exercising a refining and elevating influence, and yet they are as much under the protection of the law as chattels purely useful and absolutely essential.

This common-law rule was extremely technical and can scarcely be said to have had a sound basis to rest on. While it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog, and to steal many animals of less account than dogs. Lord Coke in his Institutes, cited above, said: "Of some things that be *feræ naturæ*, being reclaimed, felony may be committed in respect of their noble and generous nature and courage, serving *ob vitæ solatium* of princes and of noble and generous persons to make them fitter for great employments, as all kinds of falcons and other hawks, if the party that steals them know they be reclaimed."

In the reign of William I. it was made grand larceny to steal a chattel valued at twelve pence or upwards, and grand larceny was pun-

ishable by death, and one reason hinted at by Lord Coke for holding that it was not larceny to steal dogs was that it was not fit that "a person should die for them;" and yet those ancient law-givers thought it not unfit that a person should die for stealing a tame hawk or falcon.

The artificial reasoning upon which these rules were based is wholly inapplicable to modern society. *Tempora mutantur et leges mutantur in illis.* Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful service, and so far as pertains to their ownership as personal property, they possess all the attributes of other personal property.

If the common-law rule referred to ever prevailed in this State, we have no doubt it has been changed by legislation. It is provided in 2 R. S. 690, § 1, that every person who shall be convicted of stealing "the personal property" of another, of the value of $25 or under, shall be adjudged guilty of petit larceny; and then, on page 703, § 33, "personal property," as used in that chapter, is defined to mean "goods, chattels, effects, evidences of rights of action," and certain written instruments. This definition of personal property is certainly comprehensive enough to include dogs. We think it was intended to be taken literally, and that the law-makers meant to make it the crime of larceny to steal any chattel which had value and was recognized by the law as property. In a note to § 33 (3 R. S. 837), the revisers say that "this broad and comprehensive definition is given to prevent the enumeration of each particular instrument or article that may be the subject of larceny, robbery, embezzlement, or obtaining property under false pretences. The ancient idea that rights in action were not subjects of larceny has been gradually yielding to the extension of commerce, the increase of business, and the necessities of mankind, until at last we have begun to believe that anything which can be stolen, and which is of value to the owner, should be protected by the law." At the same time a system for the taxation of dogs was enacted (1 R. S. 704), and it can scarcely be supposed that the legislature meant to regard dogs as property for the purpose of taxation and yet leave them without protection against thieves.

The definition of personal property found in the statute is not to be referred to the common law but to the common understanding of the time when the statute was enacted.

In view, therefore, of all the circumstances to which we have alluded and for all the reasons stated, we are of opinion that the law-makers intended, by the legislation contained in the Revised Statutes, to change the common-law rule as to stealing dogs, if it was before recog-

nized as having force in this State; and to this effect are the only judicial decisions upon this subject which have been rendered in this State so far as they have come to our knowledge. People *v.* Maloney, 1 Park. Cr. 593; People *v.* Campbell, 4 *id.* 386; see, also, People *ex rel.* Longwell *v.* McMaster, 10 Abb. [N. S.] 132.

Our attention has been called by the counsel for the prisoner to certain decisions in other States, which tend to sustain his contention. Findlay *v.* Bear, 8 Serg. & Rawle, 571; State of Ohio *v.* Lymus, 26 Ohio St. 400; State *v.* Holder, 81 N. C. 527; Ward *v.* State, 48 Ala. 161. But so far as those cases announce views in conflict with those above expressed, we are not disposed to follow them.

We conclude therefore that the conviction was right and should be affirmed.

All concur, except FOLGER, C. J. dissenting, holding that the common law does not recognize a dog as the subject of larceny, and that the Revised Statutes, in its definition of the subjects of larceny, do not include that animal. *Judgment affirmed.*

REGINA *v.* SHICKLE,

L. R. 1 C. C. R. 158; 11 Cox C. C. 189 [1868].

THE following case was stated by Cockburn, C. J.: —

James Shickle was tried before me at the last assizes for the County of Suffolk on an indictment for larceny for stealing eleven tame partridges.

There was no doubt that the prisoner had taken the birds *animo furandi*, but a question arose whether the birds in question could be the subject of larceny; and the prisoner having been convicted I reserved the point for the consideration of the Court.

The birds in question had been reared from eggs which had been taken from the nest of a hen partridge and which had been placed under a common hen. They were about three weeks old and could fly a little. The hen had at first been kept under a coop in the prosecutor's orchard, the young birds running in and out, as the brood of a hen so confined are wont to do. The coop had however been removed and the hen set at liberty, but the young birds still remained about the place with the hen as her brood and slept under her wings at night.

It is well known that birds of a wild nature, reared under a common hen, when in the course of Nature they no longer require the protection and assistance of the hen and leave her, betake themselves

to the woods or fields and after a short time differ in no respect from birds reared under a wild hen of their own species.

The birds in question were neither tame by nature nor reclaimed. If they could be said to be tame at all it was only that their instinct led them during their age of helplessness to remain with the hen. On their attachment to the hen ceasing, the wild instincts of their nature would return and would lead them to escape from the dominion and neighborhood of man. On the other hand, from their instinctive attachment to the hen that had reared them, and from their inability to escape, they were practically in the power and dominion of the prosecutor. The question is, whether under the circumstances, there can be such property in birds of this description as can be the subject-matter of larceny.

Douglas, for the prisoner. These birds are *feræ naturæ*, and unless reclaimed are not the subject of larceny. The case finds that they were not tame nor reclaimed; that they were restrained by their instinct only from betaking themselves to the woods or fields, not being confined in any way. They could not therefore be the subject of larceny.

No counsel appeared for the Crown.

Bovill, C. J. I am of opinion that upon the facts stated, the question asked of us must be answered in the affirmative, and that the conviction is right. The case states that "from their inability to escape they were practically in the power and dominion of the prosecutor." That is sufficient to decide the point. In Regina *v.* Cory the law on the subject is very clearly laid down by my brother Channell. He there says, speaking of pheasants hatched under circumstances similar to those here: "These pheasants, having been hatched by hens and reared in a coop, were tame pheasants at the time they were taken, whatever might be their destiny afterwards. Being thus, the prosecutor had such a property in them that they would become the subject of larceny, and the inquiry for stealing them would be of precisely the same nature as if the birds had been common fowls or any other poultry, the character of the birds in no way affecting the law of the case but only the question of identity." In that statement of the law we all concur. The question here is, Were these birds the subject of property? They were so when first hatched and they remained so at the time they were taken by the prisoner, though it might be that at a later period they would become wild and cease to have an owner. The prisoner therefore was rightly convicted.

Channell, B., concurred.

Byles, J. I am of the same opinion. The usual cases of larceny of animals are those of animals which being at first wild have become

tame and reclaimed. In this case the only difference is that the birds here are tame and have been so from their birth, though they may become wild at a future time.

BLACKBURN and LUSH, JJ., concurred.

Conviction affirmed.[1]

SECTION 6. CONVERSION OF REALTY INTO CHATTELS BY SEVERANCE; SUBSEQUENT TAKING BY DISTINCT AND SEPARATE ACT.

PEOPLE v. WILLIAMS,

35 CAL. 671 [1861].

. . . . . .

BY the Court, CROCKETT, J. The defendant having been found guilty of grand larceny moved to arrest the judgment on the ground that the indictment does not charge the commission of a felony and is insufficient. The Court arrested the judgment and the prosecution has appealed.

The indictment charges that the defendant "did unlawfully and feloniously take, steal, and carry away from the mining claim of the Brush Creek Gold and Silver Mining Company, — a corporation duly organized under the laws of the State of California, — fifty-two pounds of gold-bearing quartz rock, the personal goods of the said Brush Creek Gold and Silver Mining Company, of the value of four hundred dollars."

The defendant maintains that the indictment is insufficient because it does not appear therefrom that the quartz rock had on a previous occasion been severed from the ledge and thus become personal property before the alleged taking by the defendant; and that there is no averment which rebuts the inference that the rock may have been broken or dug out of the mine by the defendant himself and immediately taken away; in which event it is claimed the offence was only a trespass on real property and not a larceny, which can only be predicated on the felonious taking of personal property.

The question for decision is, whether or not the indictment charges in sufficiently explicit terms that the rock at the time of the commission of the offence was personal property, and not a part of the realty.

The Criminal Practice Act, § 246, provides that an indictment shall

[1] [See also Regina v. Head, 1 F. & F. 350.]

be sufficient in that respect if the "act or omission charged as the offence is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;" and if "the act or omission charged as the offence is stated with such a degree of certainty as to enable the Court to pronounce judgment upon a conviction according to the right of the case."

Applying this rule to the indictment under discussion, would a person of "common understanding" on reading it infer that the defendant severed the rock from the ledge and immediately carried it away; or rather that, finding it already severed by some one else, or having himself severed it on a previous occasion, he afterwards removed it? If it be doubtful in which sense a person of common understanding would interpret the indictment, it is insufficient unless it necessarily imports the crime of grand larceny, whether it be understood in one sense or the other. It should appear plainly and explicitly on the face of the indictment that a larceny and not a mere trespass was committed. If the language employed be capable of two interpretations without doing violence to its terms, only one of which imports a charge of larceny, the indictment is bad. A person charged with crime has a right to be informed, in plain, intelligible language free from reasonable doubt, of the specific act which he is alleged to have committed.

Does it plainly appear from this indictment whether the rock alleged to have been stolen was severed by the defendant from the ledge at the time of the theft, or whether it had been severed on a previous occasion and was carried away on a subsequent occasion?

The indictment obviously leaves this question in doubt. It is entirely silent as to whether the rock was a part of a ledge, and was broken off and immediately carried away by the defendant, or whether, finding it already severed, he afterwards removed it. In either case it might be true, as alleged in the indictment, that the defendant did "steal, take, and carry away from the mining claim of the Brush Creek Gold and Silver Mining Company . . . fifty-two pounds of gold-bearing quartz rock;" and yet in the first event it would be only a trespass, while in the latter it would be a larceny, as these offences have been defined by numerous authorities. But an indictment should be capable of no such double interpretation. It should state facts which if true would necessarily import that the crime imputed to the defendant had been committed. We have seen that this indictment does not come up to this standard, and that all the facts which it avers may be true without necessarily implicating the defendant in the crime of grand larceny.

We have not overlooked the fact that the indictment avers the rock

to have been "the personal goods of the said Brush Creek Gold and Silver Mining Company." But this cannot cure the infirmity of the indictment, which should describe the property taken with sufficient accuracy to enable the Court to decide for itself whether it be of a character which renders it a subject of larceny. It is not sufficient to denominate the property as "personal goods" without describing it so as to enable the Court to decide that question for itself. We have thus far discussed the case on the theory that if the rock formed a part of a ledge or lode and was severed by the defendant and immediately removed by him, the offence was only a trespass and not a larceny.

We find in the books much subtle reasoning in respect to the difference between trespass and larceny in this class of cases. From an early period in English jurisprudence it has been held that in consequence of the stable and permanent nature of real estate, an injury to it is not indictable at common law; and it is therefore not larceny to steal anything adhering to the soil. Hence it has been held that if a person with a felonious intent severs and carries away apples from a tree or the tree itself, or growing grass or grain, or copper or lead attached to a building, the offence is only a trespass and not larceny. But if the thing had been previously severed from the soil, whether by the owner or by a third person, or even on a previous occasion by the thief himself, it has thus become personal property and is the subject of larceny. This rule involved many technical niceties, which have resulted in what appear to us to be pure absurdities. For example, if the article stolen was severed from the soil by the thief himself and immediately carried away, so that the whole constituted but one transaction, it was held to be only a trespass; but if after the severance he left the article for a time and afterward returned for it and took it away on another occasion, then it became a larceny. It therefore became necessary to determine what space of time must intervene between the severance and the taking to convert the trespass into a larceny. At first it was held that at least one day must intervene, on the theory that the law would not take notice of the fractions of a day. But this rule has been relaxed, and it is now held that no particular space of time is necessary, only the severance and taking must be so separated by time as not to constitute one transaction.

The authorities maintaining these nice distinctions are fully collated in 2 Bishop on Criminal Law, §§ 667, 668, 669.

We confess we do not comprehend the force of these distinctions nor appreciate the reasoning by which they are supported. We do not perceive why a person who takes apples from a tree with a felonious intent should only be a trespasser, whereas if he had taken them from the ground after they had fallen he would have been a thief; nor

why the breaking from a ledge of a quantity of rich gold-bearing rock with felonious intent should only be a trespass if the rock be immediately carried off; but if left on the ground and taken off by the thief a few hours later it becomes larceny. The more sensible rule, it appears to us, would have been that by the act of severance the thief had converted the property into a chattel; and if he then removed it with a felonious intent he would be guilty of a larceny, whatever dispatch may have been employed in the removal. But we do not feel at liberty to depart from a rule so long and so firmly established by numerous decisions, and we have adverted to the question mainly for the purpose of directing the attention of the legislature to a subject which appears to demand a remedial statute.

Judgment affirmed, and ordered that the remittitur issue forthwith.

Section 7. — Conversion of Animals feræ naturæ into Subjects of Larceny by Killing; Subsequent taking by distinct and separate Act.

REGINA *v.* TOWNLEY,

12 Cox C. C. 59 [1871].

COURT OF CRIMINAL APPEAL.

Case reserved for the opinion of this court by Mr. Justice Blackburn.

The prisoner and one George Dunkley were indicted before me at the Northampton Spring Assizes for stealing 126 dead rabbits.

In one count they were laid as the property of William Hollis; in another as being the property of the Queen.

There were also counts for receiving.

It was proved that Selsey Forest is the property of Her Majesty.

An agreement between Mr. Hollis and the Commissioners of the Woods and Forests on behalf of Her Majesty was given in evidence, which I thought amounted in legal effect merely to a license to Mr. Hollis to kill and take away the game, and that the occupation of the soil and all rights incident thereto remained in the Queen. No point, however, was reserved as to the proof of the property as laid in the indictment.

The evidence showed that Mr. Hollis's keepers, about eight in the morning on the 23d of September, discovered 126 dead and newly killed rabbits and about 400 yards of net concealed in a ditch in the forest behind a hedge close to a road passing through the forest.

The rabbits were some in bags and some in bundles, strapped together by the legs, and had evidently been placed there as a place of deposit by those who had netted the rabbits.

The keepers lay in wait, and about a quarter to eleven on the same day Townley and a man, who escaped, came in a cab driven by Dunkley along the road. Townley and the man who escaped left the cab in charge of Dunkley and came into the forest and went straight to the ditch where the rabbits were concealed and began to remove them.

The prisoners were not defended by counsel.

It was contended by the counsel for the prosecution that the rabbits on being killed and reduced into possession by a wrong-doer became the property of the owner of the soil, in this case the Queen (Blades *v.* Higgs, 7 L. T. N. S. 798, 834); and that even if it was not larceny to kill and carry away the game at once, it was so here, because the killing and carrying away was not one continued act.

1 Hale P. & C. 510, and Lee *v.* Risdon, 7 Taunt. 191, were cited.

The jury, in answer to questions from me, found that the rabbits had been killed by poachers in Selsey Forest, on land in the same occupation and ownership as the spot where they were found hidden.

That Townley removed them, knowing that they had been so killed, but that it was not proved that Dunkley had any such knowledge.

I thereupon directed a verdict of not guilty to be entered as regarded Dunkley, and a verdict of guilty as to Townley, subject to a case for the Court of Criminal Appeal.

It is to be taken as a fact that the poachers had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them.

The question for the Court is, whether on these facts the prisoner was properly convicted of larceny.

The prisoner was admitted to bail.

COLIN BLACKBURN.

No counsel appeared to argue on either side.

BOVILL, C. J. (*after stating the facts*). The first question that arises is as to the nature of the property. Live rabbits are animals *feræ naturæ*, and are not the subject of absolute property; though at the same time they are a particular species of property *ratione soli*, — or rather the owner of the soil has the right of taking and killing them, and as soon as he has exercised that right they become the absolute property of the owner of the soil. That point was decided in Blades *v.* Higgs, *supra*, as to rabbits, and in Lonsdale *v.* Rigg, 26 L. J. 196, Ex., as to grouse. In this case the rabbits having been killed on land the property of the Crown, and left dead on the same ground, would

therefore in the ordinary course of things have become the property of the Crown. But before a person can be convicted of larceny of a thing not the subject of larceny in its original state, as *e. g.*, of a thing attached to the soil, there must not only be a severance of the thing from the soil but a felonious taking of it also after such severance. Such is the doctrine as applied to stealing trees and fruit therefrom, lead from buildings, fixtures, and minerals. But if the act of taking is continuous with the act of severance, it is not larceny. The case of larceny of animals *feræ naturæ* stands on the same principle. Where game is killed and falls on another's land, it becomes the property of the owner of the land, but the mere fact that it has fallen on the land of another does not render a person taking it up guilty of larceny, for there must be a severance between the act of killing and the act of taking the game away. In the present case we must take it that the prisoner was one of the poachers or connected with them. Under these circumstances we might come to the conclusion that it was a continuous act, and that the poachers netted, killed, packed up, and attempted to carry away the rabbits in one continuous act, and therefore that the prisoner ought not to have been convicted of larceny.

Martin, B. I am of the same opinion. It is clear that if a person kills rabbits and at the same time carries them away, he is not guilty of larceny. Then, when he kills rabbits and goes and hides them and comes back to carry them away, can it be said that is larceny? A passage from Hale's P. C. 510, "If a man comes to steal trees, or the lead of a church or house, and sever it, and after about an hour's time or so come and fetch it away, it is felony, because the act is not continuated, but interpolated, and in that interval the property lodgeth in the right owner as a chattel, and so it was argued by the Court of King's Bench (9 Car. 1), upon an indictment for stealing the lead off Westminster Abbey," was relied on by the prosecution. There is also a dictum of Gibbs, C. J., to the same effect in Lee *v.* Risdon (7 Taunt. 191). I am not insensible to the effect of those dicta; but here we must take it as a fact that the poachers had no intention to abandon possession of the rabbits, but put them in the ditch for convenience sake; and I concur in thinking that the true law is that, when the poachers go back for the purpose of taking them away, in continuation of the original intention, it does not amount to larceny.

Bramwell, B. Our decision does not appear to me to be contrary to what Lord Hale and Gibbs, C. J., have said in the passages referred to. If a man having killed rabbits on the land of another, gets rid of them because he is interrupted and then goes away and afterwards comes back to remove the rabbits, that is a larceny; and so, if on being pursued, he throws them away; and it is difficult to perceive any dis-

tinction where the owner of a chattel attached to the freehold finds it on his land severed, and the person who severed it having abandoned it afterwards comes and takes it away. It is in those cases so left as to be in the possession of the true owner, and the act is not, as Lord Hale expresses it, continuated. In this case, however, the rabbits were left by the poachers as trespassers in a place of deposit, though it happened to be on the land of the owner; and it is just the same as if they had been taken and left at a public house or upon the land of a neighbor. If they had been left on the land of a neighbor or at a public house, could it have been said to be larceny? Clearly not; and if not why is it larceny because the poachers left them in a place of deposit on the owner's own land? It seems to me that the case is not within the dicta of Lord Hale and Gibbs, C. J., but that here the act was continuous, and that there was an asportation by the poachers to a place of deposit, where they remained not in the owner's possession.

Byles, J. I cannot say that I have not entertained a doubt in this case; but upon the whole I think that this was not larceny. The wrongful taking of the rabbits was never abandoned by the poachers, for some of the rabbits were in their bags. It could hardly be said that if a poacher dropped a rabbit and afterwards picked it up that could be converted into larceny, yet that would follow if the conviction were upheld.

Blackburn, J. I am of the same opinion. Larceny has always been defined as the taking and carrying away of the goods and chattels of another person; and it was very early settled where the thing taken was not a chattel, as where a tree was cut down and carried away, that was not larceny, because the tree was not taken as a chattel out of the owner's possession and because the severance of the tree was accompanied by the taking of it away. The same law applied to fruit, fixtures, minerals, and the like things, and statutes have been passed to make stealing in such cases larceny. Though in the House of Lords, in Blades *v.* Higgs, it was decided that rabbits killed upon land became the property of the owner of the land, it was expressly said that it did not follow that every poacher is guilty of larceny, because as Lord Cranworth said, "Wild animals while living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels so as to be the subject of larceny. They partake while living of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard and fills a wheelbarrow with apples, which he has gathered from my trees, he is not guilty of larceny, though he has certainly possessed himself of my property; and the same principle is applicable to wild animals." The principle is as old as 11 Year Book (par. 33), where it is reported that

a forester who had cut down and carried away trees could not be arraigned for larceny though it was a breach of trust; but it was said it would have been a different thing if the lord of the forest had cut down the trees and the forester had carried them away, then that would have been larceny. So that in the case of wild animals if the act of killing and reducing the animals into possession is all one and continuous, the offence is not larceny. The jury have found in this case that the prisoner knew all about the killing of the rabbits, and that they were lying in the ditch. It is clear that during the three hours they were lying there, no one had any physical possession of them and that they were still left on the owner's soil; but I do not see that that makes any difference. Then there is the statement from Hale's P. C. 510, where it is said that larceny cannot be committed of things that adhere to the freehold, as trees, or lead of a house, or the like, yet that the Court of King's Bench decided that where a man severed lead from Westminster Abbey and after about an hour's time came and fetched it away, it was felony, because the act is not continuous but interpolated; and Lord Hale refers to Dalton, c. 103, p. 166; and Gibbs, C. J., expressed the same view very clearly in Lee *v.* Risdon. Now if that is to be understood as my brother Bramwell explained, I have no fault to find with it; but if it is to be said that the mere fact that the chattel having been left for a time on the land of the owner has thereby remained the owner's property, and that the person coming to take it away can be convicted of larceny, I cannot agree with it as at present advised. If we are to follow the view taken by my brother Bramwell of these authorities, they do not apply here, for no one could suppose that the poachers ever parted with the possession of the rabbits. I agree that in point of principle it cannot make any difference that the rabbits were left an hour or so in a place of deposit on the owner's land. The passage from Lord Hale may be understood in the way my brother Bramwell has interpreted it, and if so the facts do not bring this case within it. *Conviction quashed.*

REGINA *v.* PETCH,

14 Cox C. C. 116 [1878].

This was a case reserved for the opinion of this Court by B. B. Hunter Rodwell, Esq., Q.C., M.P., the Chairman of the second court of the West Suffolk Quarter Sessions.

The prisoner was indicted under the Statute 24 & 25 Vict. c. 96, § 67, for larceny, as a servant to the Maharajah Dhuleep Sing, of

sixty-one dead rabbits, the property of his master. There was also a count for receiving.

The prisoner was employed by the Maharajah to trap rabbits upon a part of his estate, and it was the duty of the prisoner forthwith to take daily the rabbits so trapped to the head keeper.

On the morning of the 9th day of February, about half past eleven, an under-keeper named Howlett, also employed by the Maharajah, was out on his beat in the parish of North Stowe, when he observed the prisoner go three or four times from the places where his rabbit-traps were set to a spot near a furze-bush on his beat. On examining this later in the day, he found sixty-one dead rabbits in a bag hidden in a hole in the earth near the furze-bush. Howlett took twenty of the rabbits out of the bag and marked them by cutting a small slit under the throat. He then replaced them in the bag and covered it up in the hole in the ground as before. In cross-examination Howlett said that his reason for marking the rabbits was that he might know them again.

Early on the following Sunday morning the prisoner was seen by Howlett and a police constable, who had been watching the spot, to take the rabbits from the hole in the ground and put them in his cart, and he was driving the cart away along the road in a contrary direction to the head keeper's house, where he should have deposited them, when he was stopped and taken into custody by the police.

Counsel for the prisoner contended that there was no evidence to go to the jury of the larceny charged in the indictment, and referred to Regina *v.* Townley, L. Rep. 1 C. C. R. 315; 12 Cox C. C. 59.

The Court, however, held that there was evidence to go to the jury of larceny, and that the present case was distinguishable from that of Regina *v.* Townley, in consequence of the continuity of the possession having been broken by Howlett, the servant of the Maharajah, he having taken twenty of the rabbits out of the bag and marked them as described.

The Court agreed with the contention of counsel for the prisoner that there was no evidence of any intention on the part of the prisoner to abandon possession of the rabbits, and this point was not left to the jury.

The Court left the case generally to the jury, who found the prisoner guilty of the larceny charged, and the prisoner was sentenced to three months' imprisonment with hard labor; execution of the judgment was respited until the decision of this Court.

The Court reserved for the opinion of this Court the question whether, upon these facts, the prisoner was properly convicted of the larceny charged.

. . . . . .

COCKBURN, C. J. This conviction must be quashed. The case is really governed by that of Regina *v.* Townley, where the law on the subject is fully stated in the judgment of Blackburn, J. At common law, to constitute larceny it was necessary that there should be a taking and carrying away of the chattel; and among the instances put in the old books are those of growing trees and lead fixed to a building, which constitute part of the freehold, where a severance was necessary to turn them into chattels; and unless there was an interval between the one act of turning them into chattels and the other act of taking them away, during which there was a change in the possession from the person who severed them to that of the owner, the final act of carrying them away by the person who severed them did not form the subject-matter of larceny. So in the present case, although property in wild animals, as decided in Blades *v.* Higgs, 11 H. of L. Cas. 621, becomes that of the owner by being killed on his land, it does not follow that, when a man without right goes upon the land and kills wild animals, they become so reduced into the possession of the owner of the land as to render the man liable to the charge of larceny for carrying them away. In Regina *v.* Read the principle was the same as that which governs this case. It is true that in that case the prisoner was employed to trap rabbits and had authority to kill rabbits, and that availing himself of that authority, he trapped and killed rabbits; but that was not in fulfilment of his duty, but with the intention of taking the rabbits for his own purposes and not for his master. He reduced them into his own possession and not that of his master. In no sense did he reduce them into the possession of his master, for he took them direct from the trap to where the bag was concealed and put them into his bag. The only circumstance that appears to distinguish this case is the fact that the keeper Howlett marked some of the rabbits, but that was done, not with the intention of altering the possession of them, but for the purpose of identifying them. That fact does not make any difference in the case. I am of opinion that the conviction should be quashed.

POLLOCK, B. I am of the same opinion. This case was reserved that it might be determined whether there was any distinction between it and Regina *v.* Townley, and whether the nicking of the rabbits by the keeper could be considered as a reducing of them into the possession of the master. There is really no distinction. It is impossible to say that all that the prisoner did was not in his conduct as a thief.

FIELD, J. I am of the same opinion. There is no question raised as to any reduction of the rabbits into the possession of the master by the act of trapping them, but it is said that the continuity of possession by the prisoner was broken by the act of the keeper in going to the trap and nicking the rabbits. It appears to me that there is no

foundation for any distinction between this case and Regina *v.* Townley.

HUDDLESTON, B. I am of the same opinion. There was no intention on the part of the prisoner to abandon his possession of the rabbits I agree that the act of the keeper in nicking the rabbits was not for the purpose of reducing them into the possession of the master but for identifying them. I do not agree in the distinction of this case from Regina *v.* Townley drawn by the chairman of the Court of Quarter Sessions. There was no evidence from which it might have been inferred that the rabbits had been reduced into the possession of the master.

LINDLEY, J. I am of the same opinion.

Conviction quashed.

CHAPTER XXIV

LARCENY.

QUESTION NOT OF CUSTODY OR OF TITLE, BUT OF POSSESSION.

SECTION 1. WRONGFUL TAKING OF MERE CUSTODY.

REGINA *v.* HOLLOWAY,

3 Cox C. C. [241].

CROWN CASE RESERVED.

(*Coram* LORD DENMAN, C. J., PARKE, B., ALDERSON, B., COLERIDGE, J., and COLTMAN, J.)

THE prisoner, William Holloway, was indicted at the General Quarter Sessions, holden in and for the borough of Liverpool, on December 4, 1848, for stealing within the jurisdiction of the court 120 skins of leather, the property of Thomas Barton and another.

Thomas Barton and another were tanners, and the prisoner was one of many workmen employed by them at their tannery, in Liverpool, to dress skins of leather. Skins when dressed were delivered to the foreman and every workman was paid in proportion to and on account of the work done by himself. The skins of leather were afterwards stored in a warehouse adjoining to the workshop. The prisoner, by opening a window and removing an iron bar, got access clandestinely to the

warehouse and carried away the skins of leather mentioned in the indictment, and which had been dressed by other workmen. The prisoner did not remove these skins from the tannery; but they were seen and recognized the following day at the porch or place where he usually worked in the workshop. It was proved to be a common practice at the tannery for one workman to lend work, that is to say, skins of leather dressed by him, to another workman, and for the borrower in such case to deliver the work to the foreman and get paid for it on his own account, and as if it were his own work.

A question of fact arose as to the intention of the prisoner in taking the skins from the warehouse. The jury found that the prisoner did not intend to remove the skins from the tannery and dispose of them elsewhere, but that his intention in taking them was to deliver them to the foreman and to get paid for them as if they were his own work; and in this way he intended the skins to be restored to the possession of his masters.

The jury, under direction of the Court, found the prisoner guilty; and a point of law raised on behalf of the prisoner was reserved, and is now submitted for the consideration of the justices of either Bench and barons of the Exchequer.

"The question is, whether, on the finding of the jury, the prisoner ought to have been convicted of larceny.

"Judgment was postponed, and the prisoner was liberated on bail taken for his appearance at the next or some subsequent Court of Quarter Sessions to receive judgment, or some final order of the Court."

Lowndes, in support of the conviction. The finding of the jury shows that the prisoner committed larceny.

PARKE, B. Is not this case governed by R. *v.* Webb, 1 Moody C. C. 431?

Lowndes. The cases are distinguishable. In that case, miners employed to bring ore to the surface and paid by the owners according to the quantity produced, removed from the heaps of other miners ore produced by them and added it to their own heaps, the ore still remaining in the possession of the master; and it was held not to be a larceny. Here the skins were removed from the place in which they had been put by the master for custody into a place in which they were, in fact, in the prisoner's custody. In R. *v.* Webb, the ore was never out of the master's custody; in this case, the skins were distinctly out of the master's custody.

COLERIDGE, J. In the case of R. *v.* Webb there was the interval in which the ore passed from one heap to the other; was it not then out of the master's custody?

Lowndes. There was no intent to injure the owner in that case.

COLERIDGE, J. There was the intent to obtain payment for ore which the miner had not dug from the earth.

PARKE, B. It is essential that the taking should be with the intent to deprive the owner of the property in the thing taken; the jury did not find that in this case, but only that the intention of the prisoner was to get paid for the skins, as if they had been his own work.

Lowndes. It is not necessary that there should be the intention wholly to deprive the owner of the property; it is enough if the chattel is taken for the purpose of getting a benefit different from the mere use of it. In this case, though there was an intention to return the skins, there was not the intention that the owner should be put into the situation in which he was before the taking; for though he was to have the skins, he was to have them minus the wages.

PARKE, B. The taking must be with intent to acquire the entire dominion to the taker.

Lowndes. The taking must be treacherous, — for evil gain.

PARKE, B. East's definition is, "The wrongful or fraudulent taking or carrying away by any person of the mere personal goods of another person anywhere, with a felonious intent to convert them to his (the taker's) own use and make them his property, without the consent of the owner." 2 East, Pl. Cr. 553.

Lowndes. In 3 Inst. 107, Lord Coke defines larceny to be "the felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another, neither from the person nor by night in the house of the owner." Bracton and Fleta describe it as "Contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerat." (Bracton, lib. iii. c. 32, fol. 150; Fleta, lib. i. c. 36; Glanville, lib. vii. c. 17; lib. x. c. 15, follows Bracton). The "Mirror" gives the word "treachereusement;" that is, without a *bona fide* claim. In 4 Blackst. Com. 232, it is said that the taking must be "felonious; that is, done *animo furandi*, or, as the civil law expresses it, *lucri causa.*" Blackstone, therefore, uses these phrases as synonymous.

LORD DENMAN, C. J. Suppose a man takes the horse of another with intent to keep him for a year, ride him through all the counties of England, and then return him; is that a larceny?

PARKE, B. There must be an intention in the taker to acquire the whole dominion over the thing, to make it his own; to do what he likes with it.

Lowndes. The facts in this case show a taking *lucri causa.*

PARKE, B. The case of R. *v.* Webb has decided otherwise.

ALDERSON, B. This is rather an obtaining money by false pretences than a larceny.

Lowndes. If this is not a larceny it would follow that if chattels were taken for the purpose of obtaining money for them by false pretences from the owner and in that way converted to the use of the taker, he would not commit larceny. If the statement does not sufficiently show what offence has been committed, the case may be restated.

LORD DENMAN, C. J. No. The facts on which we are to decide must be stated at once. This court is not to be used to keep these cases alive.

ALDERSON, B. This will not prevent you from bringing an indictment for obtaining money under false pretences.

Lowndes. No money was obtained.

ALDERSON, B. The attempt to commit a misdemeanor is a misdemeanor; and if the removal of the skins amounted to such an attempt, the indictment may be preferred. The only question here is, whether the Recorder ought to have directed the jury to find a verdict of not guilty.

LORD DENMAN, C. J. If I thought the question was open after the authorities, I must say that a great deal might be urged in support of the proposition that these facts show a larceny to have been committed; because the owner is deprived of his property for some time, and the probability is that the intent distinguishing the case from larceny may be altered. The case which I put, of borrowing a horse for a year, without the owner's consent, with intent to ride it through England and then return it, shows this. But if we say that borrowing alone would constitute larceny, we are met by similar cases the other way. With regard to the definition of larceny, we have of late years said that there must be an intention to deprive the owner permanently of his property, which was not the intention in this case. We are not disposed to encourage nice distinctions in the criminal law; yet it is an odd sort of excuse to say to the owner, "I did intend to cheat you in fact and to cheat my fellow workmen afterwards." This, however, is not an act which is not punishable; for if it is not a misdemeanor, which at the first sight it appears to be, it is an act done toward committing that misdemeanor. We must abide by former decisions and hold that a conviction for larceny cannot in this case be supported.

PARKE, B. I am of the same opinion. We are bound by the authorities to say that this is not larceny. There is no clear definition of larceny applicable to every case; but the definitions that have been given, as explained by subsequent decisions, are sufficient for this case. The definition in East's "Pleas of the Crown" is, on the whole, the best;

but it requires explanation, for what is the meaning of the phrase "wrongful and fraudulent"? It probably means "without claim of right." All the cases, however, show that, if the intent was not at the moment of taking to usurp the entire dominion over the property and make it the taker's own, there was no larceny. If therefore a man takes the horse of another with intent to ride it to a distance and not return it, but quit possession of it, he is not guilty of larceny. So in R. v. Webb, in which the intent was to get a higher reward for work from the owner of the property. If the intent must be to usurp the entire dominion over the property and to deprive the owner wholly of it, I think that that essential part of the offence is not found in this case.

ALDERSON, B. I cannot distinguish this case from R. v. Webb.

COLERIDGE, J., concurred.

COLTMAN, J. We must not look so much to definitions, which it is impossible *a priori* so to frame that they shall include every case, as to the cases in which the ingredients that are necessary to constitute the offence are stated. If we look at the cases which have been decided, we shall find that in this case one necessary ingredient — the intent to deprive entirely and permanently — is wanting.

Conviction reversed.

REX v. PHIPOE,

2 LEACH C. C. 673; 2 EAST P. C. 599 [1795].

CROWN CASE RESERVED.

[ABRIDGED statement from Roscoe, Crim. Evid. 11 Eng. Ed. 884.]

The prisoner was charged with robbing the prosecutor of a promissory note. It appeared that the prosecutor had been decoyed by the prisoner into a room for the purpose of extorting money from him. Upon a table covered with black silk were two candlesticks covered also with black; a pair of large horse pistols ready cocked; a tumbler glass filled with gunpowder; a saucer with leaden balls; two knives, one of them a prodigiously large carving knife, their handles wrapped in black crape; pens and inkstand; several sheets of paper and two ropes. The prisoner, Mrs. Phipoe, seized the carving knife, and threatening to take away the prosecutor's life, the latter was compelled to sign a promissory note for £2,000 upon a piece of stamped paper which had been provided by the prisoner. It was objected that there was no property in the prosecutor, and the point being reserved for the opinion of the judges,

they held accordingly. They said that it was essential to larceny that the property stolen should be of some value; that the note in this case did not on the face of it import either a general or special property in the prosecutor, and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written; for it appeared that both the paper and ink were the property of Mrs. Phipoe, and the delivery of it by her to him could not, under the circumstances of the case, be considered as vesting it in him; but if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, and it was well settled that, to constitute the crime of robbery, the property must not only be valuable, but it must also be taken from the person and peaceable possession of the owner.

REGINA *v.* MANNING, ET AL.,

6 Cox C. C. 86 [1852].

MICHAEL MANNING and John Smith were tried at the Manchester Borough Sessions on the 5th of August, 1852, for stealing on the 17th of July twenty-four bags, the property of John Sheridan. The prosecutor was a potato-dealer and used bags in that trade, and he also dealt largely in bags which he bought and sold. The prisoner Manning had been for several years in the prosecutor's service and had the care of his warehouse, in which the bags were kept. The prisoner Smith had for five years regularly supplied the prosecutor with bags which he made, and from time to time when he had finished a lot his custom was to take them and put them down at the warehouse door of the prosecutor outside the warehouse, and very shortly after any bags had been so left, either he or his wife, but generally his wife, used to come to receive payment for them from the prosecutor. On the night of the 16th of July the prosecutor had a quantity of bags in his warehouse "marked." On the morning of the 17th of July the prisoner Manning went into his master's warehouse and brought out twenty-four of the bags which had been so marked by his master on the previous night, and put them down outside the warehouse by the door at the place where Smith used to deposit the bags he brought for the prosecutor, and for which he had to be paid. Shortly after Manning had brought the prosecutor's bags out of his warehouse and so placed them at the door, Smith's wife came and asked for payment for them, as for bags that her husband had brought that morning. Upon this Smith was sent for and was told what his wife had said, and the bags, which

were then lying where Manning had placed them, were pointed out to him, and he was asked whether he had brought those bags there; he said yes, he had brought them there an hour before, and that his wife had been working at them till twelve o'clock the night before in order to finish them. "Nay," said the prosecutor, "those bags are mine." "Yes," replied Smith, "they will be yours when you have paid for them." Upon this the prosecutor pointed out to the two prisoners, Manning being then also present, the mark that had been put upon the bags the night before, when they both turned the color of this (*holding up a piece of red blotting-paper*), and they were given into custody.

The recorder told the jury that if they were satisfied that Manning brought his master's bags out of the warehouse and placed them outside by the door in the manner stated, for the purpose of enabling Smith to receive payment for them from his master, and with the intent that he should do so as if they had been new bags just then finished by Smith, and for which he would be entitled to be paid, that that would be larceny; and that if they were satisfied that this had been so done by Manning, in pursuance of previous concert and arrangement between him and Smith, that Smith, though absent when the bags were so removed out of the warehouse, would be accessary before the fact to the felony. The jury said that they were satisfied that the bags had been so removed out of the warehouse by Manning for the purpose and with the intention aforesaid, and that the same had been done in pursuance of a previous arrangement between him and Smith, and they found both the prisoners guilty; and the recorder sentenced the prisoners to be imprisoned in the borough jail, and to be there kept to hard labor for six months. The question for the opinion of this court is, whether the facts stated and found amounted to larceny.

This case came on for argument before Jervis, C. J., Alderson, B., Coleridge, J., Cresswell, J., and Platt, B.

Cross appeared in support of the conviction, but was not called upon.

JERVIS, C. J. This is a clear case. The direction was quite right; and R. *v.* Hall (1 Den. C. C. 381) is expressly in point.

ALDERSON, B. Smith, though not present when the sacks were removed, was an accessary before the fact.

Conviction affirmed.

SECTION 2. ACQUISITION OF TITLE.

REGINA *v.* PRINCE,

1 L. R., C. C. R. 150; 11 Cox C. C. 193 [1868].

THE following case was stated by the Common Sergeant: —

The prisoner was tried before me at the August session of the Central Criminal Court on an indictment charging him, in the first count, with stealing money to the amount of £100, the property of Henry Allen; in the second count, with receiving the same, knowing it to have been stolen; and in two other counts the ownership of the money was laid in the London and Westminster Bank.

It appeared in evidence that the prosecutor, Henry Allen, had paid moneys amounting to £900 into the London and Westminster Bank on a deposit account in his name, and on the 27th of April, 1868, that sum was standing to his credit at that bank. On that day the wife of Henry Allen presented at the bank a forged order purporting to be the order of the said Henry Allen, for payment of the deposit, and the cashier at the bank, believing the authority to be genuine, paid to her the deposit and interest in eight bank notes of £100 each, and other notes. Among the notes of £100 was one numbered 72,799, dated the 19th of November, 1867.

On the 1st of July, 1868, the wife of Henry Allen left him and his house, and she and the prisoner were shortly afterwards found on board a steamboat at Queenstown on its way from Liverpool to New York, passing as Mr. and Mrs. Prince, Mrs. Allen then having in her possession nearly all the remainder of the notes obtained from the bank. The note for £100, No. 72,799, was proved to have been paid away by the prisoner in payment for some sheep in May, 1868, and he said he had it from Mrs. Allen.

Upon this evidence it was objected by prisoner's counsel that the counts alleging the property to be in Henry Allen must fail, as the note had never been in his possession; and that as to the other counts the evidence did not show any larceny of the note from the bank by the wife, but rather an obtaining by forgery or false pretences by her, and that the receipt by the prisoner from her was not a receipt of stolen property. I held, however, that the forged order presented by the wife was under the circumstances a mere mode of committing a larceny against the London and Westminster Bank, and that the prisoner was liable to be convicted on the fourth count.

The jury found the prisoner guilty on that count and I respited judgment and reserved for the consideration of the Court the question whether the obtaining the note from the bank by Mrs. Allen under the circumstances stated was a larceny by her; if not the conviction must be reversed.

. . . . . .

Bovill, C. J. I am of opinion that this conviction cannot be sustained. The distinction between larceny and false pretences is material. In larceny the taking must be against the will of the owner. That is of the essence of the offence. The cases cited by Mr. Collins on behalf of the prisoner are clear and distinct upon this point, showing that the obtaining of property from its owner or his servant absolutely authorized to deal with it by false pretences will not amount to larceny. The cases cited on the other side are cases where the servant had only a limited authority from his master. Here, however, it seems to me that the bank clerk had a general authority to part with both the property in and possession of his master's money on receiving what he believed to be a genuine order, and that as he did so part with both the property in and possession of the note in question the offence committed by Mrs. Allen falls within the cases which make it a false pretence and not a larceny, and therefore the prisoner cannot be convicted of knowingly receiving a stolen note.

Channell, B. I am of the same opinion. The cases cited on one side and the other are distinguishable on the ground that in one class of cases the servant had a general authority to deal with his master's property and in the other class merely a special or limited authority. If the bank clerk here had received a genuine order he would have paid the money for his master and parted with the property, and the transaction would have really been what it purported to be. If, however, the clerk makes a mistake as to the genuineness of a signature, nevertheless he has authority to decide that point; and if he pays money on a forged order the property therein passes from the master and cannot be said to have been stolen.

Byles, J. I am of the same opinion. I would merely say that I ground my judgment purely on authority.

Blackburn, J. I also am of the same opinion. I must say I cannot but lament that the law now stands as it does. The distinction drawn between larceny and false pretences — one being made a felony and the other a misdemeanor, and yet the same punishment attached to each, — seems to me, I must confess, unmeaning and mischievous. The distinction arose in former times, and I take it that it was then held in favor of life that in larceny the taking must be against the will of the owner, larceny then being a capital offence. However, as the law now

stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with his master's and parts with his master's property, such property cannot be said to be stolen inasmuch as the servant intends to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession and not with the property; if he is tricked out of the possession the offence so committed will be larceny. In Regina *v.* Longstreeth[1] the carrier's servant had no authority to part with the goods except to the right consignee. His authority was not generally to act in his master's business but limited in that way. The offence was in that case held to be larceny on that ground, and this distinguishes it from the pawnbroker's case[2] which the same judges, or at any rate some of them, had shortly before decided. There the servant from whom the goods were obtained had a general authority to act for his master and the person who obtained the goods was held not to be guilty of larceny. So in the present case the cashier holds the money of the bank with a general authority from the bank to deal with it. He has authority to part with it on receiving what he believes to be a genuine order. Of the genuineness he is the judge; and if under a mistake he parts with money he none the less intends to part with the property in it, and thus the offence is not, according to the cases, larceny but an obtaining by false pretences. The distinction is inscrutable to my mind, but it exists in the cases. There is no statute enabling a count for larceny to be joined with one for false pretences; and as the prisoner was indicted for the felony the conviction must be quashed.

Lush, J. I also agree that the conviction must be quashed. I ground my judgment on the distinction between the cases which has been pointed out. The cashier is placed in the bank for the very purpose of parting with the money of the bank. He has a general authority to act for the bank and therefore that which he does his masters the bankers do themselves through him. *Conviction quashed.*

[1] 1 Moody C. C. 137.

[2] Regina *v.* Jackson, 1 Moody C. C. 119.

SECTION 3. LARCENY BY OWNER. RIGHTFUL ADVERSE POSSESSION.

PALMER v. THE PEOPLE.

10 WEND. 165 [1833].

CERTIORARI to court of special sessions. Isaac Palmer was charged before a justice of the peace of Steuben County with having feloniously stolen five hunches of shingles, the property of one R. O. Jennings. He was tried before a court of special sessions, convicted, and sentenced to pay a fine of $6 and to be imprisoned thirty days. The shingles were levied upon by Jennings as being the property of Palmer, by virtue of an execution which Jennings held as a constable, were left at the place where the levy was made, and Palmer was informed of the levy. Palmer subsequently sold the shingles, charged the constable with having taken them away, and said that he would make him pay for them, and accordingly brought a suit against the constable. The defendant sued out a *certiorari.*

By the Court, SAVAGE, C. J. There is no doubt a man may be guilty of larceny in stealing his own property, when done with intent to charge another person with the value of it. 2 East's Cr. L. 558, § 7; 1 Hawkins, c. 33, § 30. The constable, by levying on the shingles, had acquired a special property in them, 7 Cowen, 297; 6 Johns. R. 196; and the charge was well laid by stating the property to be in the constable, 8 Cowen, 137; 14 Mass. R. 217. The evidence fully warranted the conviction, and the judgment of the court of special sessions must be affirmed.

REX v. WILKINSON,

RUSS. & RY. 470 [1821].

THE prisoners were tried before Mr. Justice Park (present LORD CHIEF JUSTICE ABBOTT) at the Old Bailey Sessions October, 1821, on an indictment for stealing six thousand six hundred and ninety-six pounds of weight of nux vomica, value thirty pounds, the property of James Marsh, Henry Coombe, and John Young in a certain boat belonging to them in the port of London, being a port of entry and discharge.

It appeared in evidence that the prosecutors were lightermen and agents and were employed by a Mr. Cooper, a merchant, who delivered

them warrants properly filled up to enable them to pass the nux vomica through the custom house for exportation to Amsterdam. The quantity was thirty bales of nux vomica, consisting of seven hundred and fifty bags.

For exportation this commodity paid no duty; but for home consumption there was a duty of two shillings and sixpence on the pound weight though the article itself was not worth above one penny per pound.

Messrs. Marsh & Co. entered the bales for a vessel about to sail to Amsterdam, called the "York Merchant," then lying in the London dock; and having done what was necessary delivered back the cocket bill and warrants to Cooper, considering him as the owner, and Marsh & Co. gave a bond to Government with Cooper under a penalty to export these goods. Marsh & Co. were to be paid for lighterage and for their services.

After this Marsh & Co. employed the prisoner Wilkinson as their servant, who was a lighterman (and who had originally introduced Cooper to them to do what was necessary respecting the nux vomica), to convey the goods from Bon Creek, where they were, to the "York Merchant" at the London docks, and lent their boat with the name "Marsh & Co." upon it to enable him so to do.

The prisoner Wilkinson accordingly went and got the nux vomica by an order commanding the person who had the possession of it to deliver it to Mr. John Cooper. The bales were marked C. 4 to 33.

When Wilkinson received the cargo, instead of taking it to the "York Merchant" he, one William Marsden, and the other prisoner Joseph Marsden, took the boat to a Mr. Brown's, a wharfinger at Lea Cut in the County of Middlesex, and there unloaded it into a warehouse which William Marsden had hired three weeks before, and which they had used once before. The two prisoners and William Marsden were there employed a long time in unpacking the bales, taking out the nux vomica, repacking it in smaller sacks, and sending it by a wagon to London, and refilling the marked bales with cinders and other rubbish which they found on the wharf.

The prisoner Wilkinson then put the bales of cinders, etc., on board the boat, took them to the "York Merchant," hailed the vessel, and said he had thirty bales of nux vomica, which were put on board and remained so for two or three days when the searcher of the customs discovered the fraud.

Marsh & Co. admitted that they had not been called on for any duties nor sued upon the bond, though the bond remained uncancelled.

The defence was, and which Cooper was called to prove, that the goods were not his (Cooper's), but that he had at William Marsden's

desire lent his name to pass the entry; and that he had done so but did not know why; that he did not know it was a smuggling transaction, or that the object was to cheat Government of the importation duties.

If these were to be considered as the goods of Cooper then it should seem a felony was committed upon them by Wilkinson and the two Marsdens by taking them in the manner described out of the hands of Marsh & Co. without their knowledge or consent, who as lightermen or carriers had a special property in them and who were also liable to Government to see the due exportation of them.

Even if they were the goods of William Marsden, who superintended the shifting of them from the bales to the sacks, the question for the judges to consider was whether this can be done by an owner against a special bailee who has made himself responsible that a given thing shall be done with the goods, and which the owner without the knowledge or consent of such bailee had by a previous act entirely prevented.

The learned judge told the jury that he would reserve this point for the opinion of the judges; but desired them to say whether they thought the *general* property in the goods was in Cooper or William Marsden.

The jury found the prisoners guilty and that the property was William Marsden's.

In Michaelmas term, 1821, eleven of the judges (Best, J., being absent) met and considered this case. Four of the judges, namely, Richardson, J., Burrough, J., Wood, B., Graham, B., doubted whether this was larceny because there was no intent to cheat Marsh & Co. or to charge them, but the intent was to cheat the Crown. Seven of the judges, namely, Garrow, B., Holroyd, J., Park, J., Bayley, J., Richards, C. B., Dallas, C. J., Abbott, L. C. J., held it a larceny because Marsh & Co. had a right to the possession until the goods reached the ship; they had also an interest in that possession, and the intent to deprive them of their possession wrongfully and against their will was a felonious intent as against them, because it exposed them to a suit upon the bond. In the opinion of part of the seven judges this would have been larceny although there had been no felonious intent against Marsh & Co., but only an intention to defraud the Crown.[1]

[1] *Vide* Fost. 124.

REX *v.* BRAMLEY,

Russ. & Ry. 478 [1822].

The prisoner was tried upon a charge of burglary before Mr. Clarke, the King's counsel, at the spring Assizes for the County of Derby in the year 1822.

The indictment charged the prisoner with a burglary in the dwelling-house of one Thomas Noon, and with stealing a box, two purses, twenty-two pounds ten shillings in silver, six shillings and threepence in copper, a promissory note for the payment of ten pounds, and eighteen promissory notes for the payment of one pound each, the property of the said Thomas Noon. In another count the property was stated to belong to Sarah Sisson, Ann Fretwell, and Ann Noon.

The box and the other articles (all of which were in the box when taken by the prisoner) were the property of a Female Friendly Society established under the statute 33 G. III., c. 54, and the rules, orders, and regulations of which had been exhibited to and allowed and confirmed by the Sessions as directed by that statute. The society held their meetings at a public-house kept by Thomas Noon, the person mentioned in the indictment; and the funds of the society were kept in the box, which, with the funds it contained, was always deposited in a bedchamber in the house of Thomas Noon after the meetings of the society had ended. It was directed by the rules of the society that the box should remain in the custody of the landlord of the house or any other person whom the society should appoint, he being responsible for whatever effects were lodged therein.

The persons in whom the property was laid in one of the counts of the indictment, namely, Sarah Sisson, Ann Fretwell, and Ann Noon, were stewardesses of the society, appointed according to its rules. The box (as directed also by the rules of the society) had three different locks upon it, and each stewardess had one key. The stewardesses were (by the same rules) to serve for one year and then to resign their keys, cash, and books to the new stewardesses.

The society met on the evening of the night in which the offence was committed, and the box with the funds in it was, after the meeting broke up, deposited in the usual place in Thomas Noon's house, from whence it was afterwards taken by the prisoner, who gained admission to the chamber by means of a ladder and breaking open the window.

The prisoner had been for some time a member of the society. One of the rules of the society was that each member should pay sixpence

to the stock every fourth Monday; and that if a member failed to pay for four successive nights she should be excluded. The prisoner had failed to pay for four successive nights, the last of which was the night the property was taken; but no order for excluding her had been made by the society.

The prisoner was convicted; but a case was reserved for the opinion of the judges upon the question whether, considering the situation in which the prisoner stood with respect to this property, the conviction was proper.

In Easter term, 1822, the JUDGES (ten of them being present) were clear that as the landlord was answerable to the society for the property the conviction was right.

REGINA v. WEBSTER,

9 Cox C. C. 13 [1861].

CASE reserved for the opinion of this Court by the Chairman of the West Riding Sessions, held at Sheffield.

William Webster was indicted at the West Riding of Yorkshire spring Intermediate Sessions, held at Sheffield, on the 22d May, 1861, for stealing, on the 11th of May, at Ecclesfield, three sovereigns and one half sovereign, the property of Samuel Fox and others.

It was proved on the trial that James Holt was in possession of a shop, where goods were sold for the benefit of a society called the "Stockbridge Band of Hope Co-operative Industrial Society."

Each member of the society partook of the profit and was subject to the loss arising from the shop. Holt (being himself a member) had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of such management. The prisoner, also a member of the society, assisted in the shop without salary.

On the occasion of the alleged larceny, Holt had marked some sovereigns and half-sovereigns and placed them in the till. The prisoner was suspected of taking some of them, and when charged with this, he admitted that he had taken the coins which formed the subject of this charge, and produced them from his pocket.

The prosecution failing to prove that this was a friendly society duly enrolled, elected to amend the indictment by substituting the name of James Holt for that of Samuel Fox and others, and the same was amended accordingly.

The counsel for the prisoner put in a copy of the rules of the society, with the name of John Tidd Pratt printed at the end thereof, and

proved that this copy had been examined with the original copy, signed and sealed by the registrar of friendly societies, but which was not produced. He also put in a conveyance of the shop and premises to Samuel Fox and others as trustees.

No other evidence of the trusteeship was given.

The counsel for the prosecution objected that in order to prove the society to be a friendly society under the 18 & 19 Vict. c. 63, it was necessary to produce the original copy signed by the registrar, or to account for its absence sufficiently to justify the admission of secondary evidence.

I overruled this objection, and admitted this evidence as proof that the society was duly enrolled.

It was contended for the prisoner that Fox and others were the trustees; that this was a friendly society, and that the property should be laid in Fox and others, and not in Holt, and that the prisoner could not therefore be convicted on the indictment as amended; that as to any special property Holt might have in the money taken, he was joint owner of it with the prisoner, and as partner with him was equally in possession of it, and could not therefore be convicted.

The Court overruled these last mentioned objections, and the prisoner was convicted and sentenced to be imprisoned in the house of correction at Wakefield for nine calendar months, subject to the opinion of the Court of Criminal Appeal whether under the circumstances the conviction was right.

The prisoner was admitted to bail to await the decision of the Court of Criminal Appeal.

A copy of the rules of the society accompanies this case, and is to be taken as incorporated therewith.

WILSON OVEREND, Chairman.

. . . . . .

WILLIAMS, J. How does this case differ from Rex *v.* Bramley, Russ. & Ry. 478, where a member of a benefit society entered the room of a person with whom a box containing the funds of the society was deposited, and took and carried it away, and it was held to be larceny, and the property to be well laid in the bailee?

POLLOCK, C. B. No doubt a man who has pawned his watch with a pawnbroker may be indicted for stealing it from the pawnbroker. The present case finds that Holt was in possession of the shop and had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of such management, and therefore he may, *quoad hoc*, be treated as the owner.

By the COURT, *Conviction affirmed.*

CHAPTER XXV.

LARCENY: DIFFERENT FORMS OF TAKING.

SECTION 1. STEALING FROM ONE'S OWN CUSTODY.

REGINA *v.* RILEY,

DEARS. C. C. 149; 6 Cox, C. C. 88 [1853].

AT the General Quarter Sessions of the Peace for the County of Durham, held at the city of Durham before Rowland Burdon, Esq., Chairman, on the 18th day of October, in the year of our Lord 1852, the prisoner was indicted for having, on the 5th day of October, 1852, stolen a lamb, the property of John Burnside. The prisoner pleaded not guilty. On the trial it was proved that on Friday, the 1st day of October, in the year of our Lord 1852, John Burnside, the prosecutor, put ten white-faced lambs into a field in the occupation of John Clarke, situated near to the town of Darlington. On Monday, the 4th day of October, the prisoner went with a flock of twenty-nine black-faced lambs to John Clarke, and asked if he might put them into Clarke's field for a night's keep, and upon Clarke agreeing to allow him to do so for one penny per head, the prisoner put his twenty-nine lambs into the same field with the prosecutor's lambs. At half-past seven o'clock in the morning of Tuesday, the 5th of October, the prosecutor went to Clarke's field, and in counting his lambs he missed one, and the prisoner's lambs were gone from the field also. Between eight and nine o'clock in the morning of the same day, the prisoner came to the farm of John Calvert, at Middleton St. George, six miles east from Darlington, and asked him to buy twenty-nine lambs. Calvert agreed to do so, and to give 8*s.* apiece for them. Calvert then proceeded to count the lambs and informed the prisoner that there were thirty instead of twenty-nine in the flock, and pointed out to him a white-faced lamb; upon which the prisoner said, "If you object to take thirty, I will draw one." Calvert however bought the whole and paid the prisoner £12 for them. One of the lambs sold to Calvert was identified by the prosecutor as his property and as the lamb missed by him from Clarke's field. It was a half-bred, white-faced lamb, marked with the letter "T," and similar to the other nine of the prosecutor's lambs. The twenty-nine lambs belonging to the prisoner were black-faced lambs. On the 5th October, in the afternoon, the prisoner stated to two of the witnesses that he

never had put his lambs into Clarke's field and had sold them on the previous afternoon, for £11 12*s.*, to a person on the Barnard Castle road, which road leads west from Darlington.

There was evidence in the case to show that the prisoner must have taken the lambs from Clarke's field early in the morning, which was thick and rainy.

It was argued by the counsel for the prisoner, in his address to the jury, that the facts showed that the original taking from Clarke's field was by mistake; and if the jury were of that opinion, then, as the original taking was not done *animo furandi*, the subsequent appropriation would not make it a larceny, and the prisoner must be acquitted. The chairman, in summing up, told the jury, that though they might be of opinion that the prisoner did not know that the lamb was in his flock until it was pointed out to him by Calvert, he should rule that in point of law the taking occurred when it was so pointed out to the prisoner and sold by him to Calvert, and not at the time of leaving the field. The jury returned the following verdict: The jury say that at the time of leaving the field the prisoner did not know that the lamb was in his flock, and that he was guilty of felony at the time it was pointed out to him.

The prisoner was then sentenced to six months' hard labor in the house of correction at Durham; and being unable to find bail, was thereupon committed to prison until the opinion of this Court could be taken upon the question whether Charles Riley was properly convicted of larceny.

Pollock, C. B. We are all of opinion that the conviction is right. The case is distinguishable from those cited. R. *v.* Thristle decides only that if a man once gets into rightful possession, he cannot by a subsequent fraudulent appropriation convert it into a felony. So in R. *v.* Thurborn, in the elaborate judgment delivered by my brother Parke on behalf of the court of which I was a member, the same rule is laid down. It is there said that the mere taking up of a lost chattel to look at it would not be a taking possession of it; and no doubt that may be done without violating any social duty. A man may take up a lost chattel and carry it home, with the proper object of endeavoring to find the owner; and then afterwards, if he yields to the temptation of appropriating it to his own use, he is not guilty of felony. In Leigh's Case, also, the original taking was rightful, but here the original taking was wrongful. I am not desirous of calling in aid the technicality of a continuing trespass; and I think this case may be decided upon the ground either that there was no taking at all by the prisoner in the first instance or a wrongful taking, and in either case, as soon as he appropriates the property, the evidence of felony is complete.

PARKE, B. I think that this case may be disposed of on a short ground. The original taking was not lawful but a trespass, upon which an action in that form might have been founded; but it was not felony, because there was no intention to appropriate. There was, however, a continuing trespass up to the time of appropriation, and at that time, therefore, the felony was committed. Where goods are carried from one county to another they may be laid as taken in the second county, and the difference between this and Leigh's Case, as well as the others cited, is that the original taking was no trespass. It was by the implied license of the owner, and the same thing as if he had been entrusted by the prosecutor with the possession of the goods.

WILLIAMS, TALFOURD, and CROMPTON, JJ., concurred.

Conviction affirmed.

REGINA v. POYNTON,

9 Cox C. C. 249 [1862].

COURT OF CRIMINAL APPEAL.

CASE reserved by Pollock, C. B., for the opinion of this Court.

Thomas Poynton, a letter carrier, was tried before me at the last Assizes for the borough of Leicester, and convicted upon an indictment charging him with having, while employed under the post-office of the United Kingdom, feloniously stolen, taken, and carried away one post-letter, the property of Her Majesty's Postmaster-General, containing two half-sovereigns, and addressed as follows: "Stephen Sullivan, Dealer, Black Horse, Belgrave-gate, Leicester, Care of Mrs. Swift."

A second count charged him with embezzling and a third with secreting the said letter; and in the fourth count he was charged with larceny of the same letter, both it and the money being laid as the property of Charles Donald Style.

On the trial it was proved that a test letter, addressed as above stated, was prepared by one of the inspectors of the post-office and posted at Melton on the night of the 1st May. It arrived at the post-office at Leicester in due course on the following morning, and was, among others, sorted to the prisoner for delivery.

The letter in question ought to have been delivered by the prisoner at its place of destination between half-past eight and nine in the morning. The letter, however, was not delivered, and the prisoner returned to the post-office as usual and reported himself to the postmaster as having finished his delivery.

It was the duty of the prisoner, in case there were any letters which

from any cause he was unable to deliver, to bring them back to the post-office.

On his return from delivery, he brought the pouch, which contained four which he had so been unable to deliver, but none of which contained coin. The letter in question was not returned nor did the prisoner give any account of it.

It having been shortly afterwards ascertained that the letter in question had not been delivered, the inspector who had caused it to be posted asked why he had not delivered it. The prisoner at once produced from his right hand trousers pocket the letter in question, which was unopened, and the coin safe within it. Upon being asked why he had not delivered it, the prisoner stated that the house was closed. This statement, however, was proved to be untrue. The prisoner further stated that he was going to deliver it in the afternoon.

I directed the jury that, if they were satisfied that the prisoner put the letter into his pocket with the intention of stealing or secreting it, he might be convicted.

I reserved for the consideration of the Court the question whether, under the circumstances, the prisoner's dealing with the letter amounted to actual stealing.

The jury found the prisoner guilty and stated they were of opinion that the prisoner detained the letter with the intention of stealing it.

. . . . . .

POLLOCK, C. B. We are all of opinion that there is no doubt of the conviction being right. I reserved the case during the trial, and if there had been any opportunity for reconsidering after the finding of the jury, I should have withdrawn it. *Conviction affirmed.*

REGINA *v.* HALL,

3 Cox C. C. 245 [1849].

CROWN CASE RESERVED.

THE following case was reserved by the Recorder of Hull: —

John Hall was tried at the last Epiphany Quarter Sessions for the borough of Hull on an indictment charging him with stealing fat and tallow, the property of John Atkin.

John Atkin, the prosecutor, is a tallow-chandler, and the prisoner at the time of the alleged offence was a servant in his employment. On the morning of the 6th of December last, the prosecutor, in consequence of something that had occurred to excite his suspicions, marked a quantity of butcher's fat, which was deposited in a room immediately above

the candle-room in his warehouse. In the latter room was a pair of scales used in weighing the fat, which the prosecutor bought for the purposes of his trade. At noon the foreman and the prisoner left the warehouse to go to dinner, when the former locked the doors and carried the keys to the prosecutor. At that time there was no fat in the scales. In about ten minutes the prisoner came back and asked for the keys, which the prosecutor let him have. The prosecutor watched him into the warehouse and saw that he took nothing in with him. In a short time he returned the keys to the prosecutor and went away. The prosecutor then went into the candle-room and found that all the fat which he had marked had been removed from the upper room, and after having been put into a bag had been placed in the scales in the candle-room. The prosecutor then went into the street and waited until a man of the name of Wilson came up, who was shortly followed by the prisoner. The latter on being asked where the fat came from that was in the scales, said it belonged to a butcher of the name of Robinson; and Wilson, in the prisoner's presence, stated that he had come to weigh the fat which he had brought from Mr. Robinson's. The prosecutor told Wilson that he would not pay him for the fat until he had seen Mr. Robinson and left the warehouse for that purpose. Wilson immediately ran away, and the prisoner, after offering to the prosecutor's wife if he was forgiven to tell all, ran away too and was not apprehended until some time afterwards, at some distance from Hull.

I told the jury that if they were satisfied that the prisoner removed the fat from the upper room to the candle-room and placed it in the scales with the intention of selling it to the prosecutor as fat belonging to Mr. Robinson, and with the intention of appropriating the proceeds to his own use, the offence amounted to larceny.

The jury found the prisoner guilty.

Dearsley for the prisoner. There was no larceny in this case. The offence was an attempt to commit a statutable misdemeanor, and only punishable as such. The case of R. *v.* Holloway, 13 Cox C. C. 241, decides it. There was an asportation, but no intention to dispose of the property, for it was part of the very scheme that the owner should not be deprived of his property in the fat. There must to constitute larceny be a taking with intention of gain and of depriving the owner of the property forever. The last ingredient is wanting here. (He cited R. *v.* Morfit, R. & R. 307.)

ALDERSON, B. If a man takes my bank note from me and then brings it to me to change, does he not commit a larceny?

Dearsley. A bank note is a thing unknown to the common law, and therefore the case put could not be larceny at common law.

LORD DENMAN, C. J. The taking is admitted. The question is

whether there was an intention to deprive the owner entirely of his property; how could he deprive the owner of it more effectually than by selling it? To whom he sells it cannot matter. The case put of the bank note would be an ingenious larceny, but no case can be more extreme than this.

PARKE, B. In this case there is the intent to deprive the owner of the dominion over his property, for it is put into the hands of an intended vendor, who is to offer it for sale to the owner, and if the owner will not buy it, to take it away again. The case is distinguishable from that of R. *v.* Holloway by the existence of this intent and further by the additional impudence of the fraud.

ALDERSON, B. I think that he who takes property from another intends wholly to deprive him of it, if he intend that he shall get it back again under a contract by which he pays the full value for it.

COLERIDGE, J., and COLTMAN, J., concurred.

Conviction affirmed.

REGINA *v.* JOHNSON, ET AL.,

5 Cox C. C. 372 [1851].

COURT OF CRIMINAL APPEAL.

AT the General Quarter Sessions of the Peace held in and for the liberty of Peterborough on the 3d day of July, 1851, Thomas Johnson and Charles Wright were indicted for stealing a banker's check for the payment of £42; four bank notes for the payment of £10 each; and forty-four sovereigns, the property of John Salman; and a verdict of guilty was recorded against them, subject to the opinion of the Court of Criminal Appeal, on the following case: —

CASE.

The prosecutor was seated at his shop door at Peterborough on the 28th of June last, being market day; the prisoners placed themselves near him and began a conversation about the sale of some beasts and a pony; they disagreed as to the price, Johnson asking £42 and Wright offering £40, when the prosecutor said, "Split the difference." Johnson then said Wright should have them were it not that his (Johnson's) father would be angry, as Wright had bought two cows over his head; Wright offered to give up the cows; the prosecutor again interposed, and the prisoners appeared to conclude a bargain that Wright should give Johnson £42 for the beasts and pony, and that a half-sovereign should be returned, provided the prosecutor would take the

money from Wright and pay it to Johnson, as if he (the prosecutor) was the buyer, and so that Johnson's father might believe him to be the real purchaser. The prosecutor consented to act as a "go-between." The parties then entered his shop and Wright counted out forty-two sovereigns, forty of which were passed through the prosecutor's hands to Johnson and the other two laid upon the counter. Johnson laid down the forty sovereigns upon the counter also, with the explanation that his father, "who was an austere man," would not be satisfied without a check upon a banker, and requested the prosecutor to draw one accordingly. The prosecutor went round to his desk, leaving the prisoners with the sovereigns, drew the check payable to Thomas Johnson, or bearer, for £42, returned, and delivered it to Johnson. At this time he lost all thought of the money, and when he returned from his desk the sovereigns had disappeared. Johnson said the prosecutor must go with him to the bank to draw the money. The prosecutor consented, and Wright was to remain in the shop until they returned "to finish the transaction." The prosecutor and Johnson left Wright alone at the shop door and went to the bank together, when the check was cashed, by desire of the prosecutor, in four notes of £10 each and two sovereigns. Johnson took the money and came out of the bank, the prosecutor stopping for a minute or two to give some directions about his pass-book. Instead of returning at once to Wright (at the prosecutor's shop), Johnson requested the prosecutor to accompany him to an inn where he said his father was to satisfy him as to the business. They went into the inn-yard together, where Johnson called for his pony, at the same time slipping a half-sovereign into the prosecutor's hand, saying, "I will go and turn out the beasts," when he made off by the back entrance of the inn-yard, leaving the prosecutor with the half sovereign and the pony, which the hostler delivered to him, instead of returning with him to the shop (where Wright was to remain) to finish the transaction, as the prosecutor all along expected was to be done, and the forty-two sovereigns handed over to him. The prosecutor then for the first time suspected he had been cheated. He made haste home with the pony and found that Wright had fled and the forty-two sovereigns also, nobody but prosecutor's daughter having been in the shop. The pony with the bridle and saddle were not worth more than fifty shillings. The prisoner Johnson was well dressed like a farmer and Wright like a jobber; and the prosecutor swore that he believed them to be respectable men and engaged in a *bona fide* transaction, and that he assisted in it purely out of good nature and was not to receive one penny for what he did. He also stated that he should have allowed Johnson to go to the bank alone with the check, he remaining with Wright and the sovereigns in

the shop, had not Johnson requested him to go to the bank with him. The prosecutor expressly stated in his evidence that he expected Johnson was to come back with him to Wright and that he was to have the forty-two sovereigns from Wright; that he did not expect Wright would "cut away" and did not consider Johnson at liberty to go off with the money before he (the prosecutor) had the sovereigns in exchange. It was proved that during the same morning the prisoners attempted to engage another party in a similar transaction, and evidence was given to show that the prisoners were acting in concert and were apprehended in a gig together the same evening about twenty miles from Peterborough, Wright having forty-five sovereigns upon him.

The prisoners' counsel contended that these facts would not justify a conviction for larceny. The chairman therefore put the following questions to the jury: —

1. Did the prisoners throughout intend to get the property of the prosecutor into their possession by fraud and apply it to their own use?

2. Did the prosecutor intend to part with his property in the check and change until Johnson returned with them and the prosecutor received the forty-two sovereigns?

3. If they should find that when the prosecutor gave Johnson the check he parted with the property in it and the money obtained for it at the bank, whose property was the forty-two sovereigns left upon the counter?

And he directed that if they found the first question in the affirmative and the second in the negative, that the prisoners were in law guilty of larceny of the check and change; and further, that if they found the first two questions in the affirmative and found also that the forty-two sovereigns left on the counter became the property of the prosecutor when the check was delivered to Johnson or cashed at the bank, and were taken away by Wright, they were guilty of a larceny of those forty-two sovereigns. The jury found an original intent to defraud, followed by a general verdict of guilty, when the prisoner's counsel applied for a case for the opinion of the Court of Criminal Appeal; and thereupon the chairman requested the jury to give distinct answers to the several questions before stated, and they answered the first question in the affirmative and the second in the negative, and no reply to the third question was thereupon asked for. If, upon the facts stated and findings by the jury, the prisoners are guilty of larceny, the verdict is to stand. The prisoners were liberated upon giving bail to appear and receive judgment.

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LORD CAMPBELL, C. J., now delivered the judgment of the Court. We are of opinion that the conviction is right as to the bank notes and two sovereigns given in exchange for the check. It appears that the check was the property of the prosecutor, and the jury found that the prisoners throughout intended to get the property of the prosecutor into their possession by fraud and to apply it to their own use; and that the prosecutor did not intend to part with his property in the check and change till Johnson returned to his shop and he received the forty-two sovereigns. The check then being the property of the prosecutor, he accompanied Johnson to the banker's where it was to be cashed; and then it is expressly found in the case, that the two being together at the banker's, the check was cashed *by the desire of the prosecutor* in four £10 notes and two sovereigns. These words in the case are extremely material, because they show that the prosecutor continued to exercise control over the transaction as proprietor of the check, and it was upon his direction that the banker paid the four notes and two sovereigns. These were handed over to Johnson, and we must take it that they were so handed over with the permission and by the order of the prosecutor, and that Johnson was entrusted to hold them and merely to hold them for the prosecutor. He had the custody only and not the possession, which remained in the prosecutor. Both the property and the possession remained in the prosecutor, and Johnson received them with the intention to steal; and he afterwards actually did steal them, for he took them *invito domino*. The authorities in 2 East P. C. are expressly in point, and the conviction must be affirmed. *Conviction affirmed.*

REGINA *v.* COOKE,

12 Cox C. C. 10 [1871].

COURT OF CRIMINAL APPEAL.[1]

CASE reserved for the opinion of this Court by the Chairman of the Worcestershire Quarter Sessions.

At the Worcestershire Quarter Sessions held on the 2d of January, 1871, the above named prisoner, Edwin Cooke, was tried before me for stealing certain moneys belonging to his master, one George Hands.

The said George Hands was a currier at Kidderminster and in the habit of employing several workmen in his said business.

The prisoner was, in and before the month of November last and

continued until the early part of the following month to be, a servant of the said George Hands, being employed at a weekly salary as a confidential foreman over the workmen.

It was part of the duty of the prisoner to engage and dismiss the workmen as occasion required; and he generally but not invariably consulted his master as to such engagement and dismissal, and as to the amount of wages at which such workmen were to be engaged.

The workmen were engaged at so much a week for ordinary time, and they were to be paid after the same proportionate rate for any overtime.

A wages book was kept at the master's counting-house and was given out to the prisoner on the morning of every Saturday (which was the pay-day for the workmen) in order that he might enter on a pay-sheet in the said book the names of the several workmen who had been employed during the week, and to set opposite to each person's name the amount due to him for wages. When this was done the prisoner, according to the usual practice, brought back the book to the counting-house and gave it to the master's cashier, who generally showed it to the master. The several sums entered in the pay-sheet were then added up and the total amount paid by the cashier to the prisoner, whose duty it would be to pay thereout to the several workmen their respective wages.

Among the workmen so employed under the prisoner in the month of November last was a man named Williams, who had been engaged by the prisoner at 24*s.* a week for ordinary time (overtime if any to be paid for in addition at the same proportionate rate). During the week ending the 12th of November last Williams had worked overtime and the wages due to him for that week, calculated at the rate of 24*s.* a week, amounted to the sum of £1 8*s.* and no more. The prisoner, however, had before this time fraudulently represented to his master that Williams had been engaged at the rate of 26*s.* a week, and in the aforesaid pay-sheet for the week ending the 12th of November last he fraudulently set opposite the name of Williams, instead of the said sum of £1 8*s.* (the correct amount due to him), the sum of £1 10*s.* 4*d.*, being in fact the amount that Williams would have been entitled to if he had been engaged at the rate of 26*s.* instead of 24*s.* a week.

The total amount of the wages in the said pay sheet for that week, including the said sum of £1 10*s.* 4*d.* so represented to be due to Williams, was the sum of £21 18*s.*, and the said cashier in ignorance of the fraud practised by the prisoner and believing that the said pay-sheet was correct, on the same 12th of November paid to the prisoner out of his master's moneys the said sum of £21 18*s.*, in order that he might by means thereof pay the several workmen mentioned in the pay-

sheet the wages due to them respectively, and the prisoner was not authorized, either by his master or by the cashier, to apply any part of such moneys for any other purpose.

After obtaining the said sum of £21 18*s.* from the cashier in manner aforesaid and on the same day, the prisoner paid thereout to Williams the sum of £1 8*s.*, being the correct amount of the wages due to him, and fraudulently appropriated thereout to his own use the sum of 2*s.* 4*d.*, being the excess of the sum represented in the said pay-sheet to be due to Williams over the sum actually due, and the prisoner intended at the time when he obtained the said money from the cashier to appropriate the said excess to his own use and to defraud his master of the same.

The appropriation of this excess of 2*s.* 4*d.* was the subject of the first count of the indictment on which the prisoner was tried. There were two other counts charging the prisoner with stealing moneys belonging to his master, but the facts, except as to the names, dates, and amounts, being exactly the same as those proved under the first count, are not necessary to be stated for the purposes of this case.

It was objected by the counsel for the prisoner that even if the above facts were proved the offence of the prisoner was not a felony, but that of obtaining money by false pretences.

I declined to withdraw the case from the jury on that objection; but a verdict of guilty having been returned I reserved the point for the consideration of this court and judgment was in the meantime postponed; and the prisoner, not having as I believe been able to obtain the required bail, is now detained in the Worcester prison.

The question on which I respectfully desire the opinion of the Court is, whether the prisoner, on the foregoing state of facts, was properly found guilty of felony.

(Signed) R. PAUL AMPHLETT,
Chairman of the above Court of Quarter Sessions.

. . . . . .

BOVILL, C. J. The real point submitted to us in this case is whether there was any evidence to go to the jury of a larceny having been committed. The objection raised by the prisoner's counsel was that even if the facts stated in the case were proved the offence of the prisoner was not a felony but that of obtaining money by false pretences. The point is substantially whether on the facts stated there was any evidence of a larceny that ought to have been submitted to the jury or whether the case ought to have been withdrawn from them. The facts are that the cashier of the prosecutor, in ignorance of the fraud practised upon him by the prisoner, paid to the prisoner £21 18*s.* of the moneys of his master, in order that he might by means thereof pay the

several workmen mentioned in the pay-sheet the wages due to them respectively, and the prisoner was not authorized either by his master or by the cashier to apply any part of such moneys for any other purpose. After obtaining the said sum of £21 18*s.*, and on the same day, the prisoner paid thereout to Williams the sum of £1 8*s.*, being the correct amount of the wages due to him, and fraudulently appropriated thereout to his own use the sum of 2*s.* 4*d.*, being the excess of the sum represented in the pay-sheet to be due to Williams over the sum actually due, and the prisoner intended at the time when he obtained the money from the cashier to appropriate the said excess to his own use and to defraud his master of the same. The whole foundation therefore of the argument of the prisoner's counsel fails, namely, that the jury could not find the identical money misappropriated because the case states the receipt of the particular sum of the master's money, and that the prisoner paid *thereout* £1 8*s.* to Williams and fraudulently appropriated *thereout* to his own use 2*s.* 4*d.*, being the excess of the sum represented in the pay-sheet. On that footing this case steers clear of the difficulty which has arisen in many of the cases, for upon this evidence there was a misappropriation of the very moneys he received from his master. It is now contended that the money was obtained by false pretences in the first instance, but that was a question for the jury. Independently of that, a second point was taken as to the condition of the money at the time of the misappropriation. Was it the property of the master? The money handed over to the prisoner through the hands of the cashier remained the property of the master, and though in the actual possession of a servant, was in the constructive possession of the master. Under these circumstances a servant stands in a different position to a bailee at common law. A bailee is possessed of certain rights over property entrusted to him, but a servant's possession is the constructive possession of his master, and at common law he is guilty of larceny if he fraudulently appropriates his master's property to his own use. In some cases where a servant received money from third persons on account of his master, it was formerly said there was no constructive possession in the master, and the statutes relating to embezzlement were passed to meet those cases. Regina *v.* Watts, 6 Cox C. C. 304, was an instance of that. There the prisoner being a servant and the money received being his masters' and constructively in their possession at the time the prisoner appropriated it, the prisoner was guilty of larceny. In this case the money remained in the possession of the prisoner, and then whose money was it? Why the masters'. At the time when the prisoner took possession of the 2*s.* 4*d.* and appropriated that money, whose money was it? I answer, the master's; and therefore it seems to me that the prisoner

was guilty of larceny and that there was abundant evidence in support of this. As to the case of Regina *v.* Thompson, that proceeded altogether on the ground whether there was larceny in the first instance, but that does not touch the second point here. No point was made there as to the effect of the Bailee Act or that the possession of the prisoner was that of a servant. The moment it is established that it is a misappropriation of money entrusted to a servant the case falls within Regina *v.* Goode and similar cases. The case of Regina *v.* Prince was not a case of master and servant and is therefore distinguishable. I therefore think the conviction was right.

WILLES, J. I merely wish to refer in confirmation of the Lord Chief Justice's judgment to a passage very much in point in Russell on Crimes, p. 388, where the case of Regina *v.* Murray is stated thus: "So if money has been in the possession of the master by the hands of one of his clerks, and another of his clerks receives it from such clerk and embezzles it, it is larceny. The prisoner was a clerk in the employ of A. and received £3 of A.'s money from another clerk that he might pay for inserting an advertisement. He paid 10*s.* and charged A. 20*s.*, fraudulently keeping back the difference. And upon a case reserved it was held that this was not embezzlement because H. had had possession of the money by the hands of the other clerk, and Mr. Greaves in a note adds, "*ergo*, it was larceny."

The other judges concurred.

Conviction affirmed.

SECTION 2. IN GENERAL, NO LARCENY BY ONE ALREADY IN POSSESSION.

REGINA *v.* THRISTLE,

3 Cox C. C. 573 [1849].

COURT OF CRIMINAL APPEAL.

THE two following cases were reserved by the Worcestershire Court of Quarter Sessions: —

FIRST CASE.

The prisoner, William Thristle, was indicted at the Worcester Quarter Sessions, 15th October, 1849, for stealing one watch, the property of Robert Warren.

It appeared in evidence that the prosecutor, in 1848, met the pris-

oner, who was a watchmaker at Malvern. The prosecutor asked prisoner if he was going as far as prosecutor's house; the prisoner said "yes," if the prosecutor had anything for him. The prosecutor said his watch wanted regulating, if prisoner would call.

The prisoner went to the prosecutor's house, and after examining the watch, told the prosecutor's wife that he could do nothing with it there but must take it to his own house. The prisoner then took it and on his way home met the prosecutor, to whom he mentioned that he was taking the watch to his own house and would return it in two or three days. Prosecutor made no objection.

In a few weeks after prisoner left the neighborhood without returning prosecutor's watch, and it was not afterwards heard of. The prisoner, on being taken into custody, said, "I have disposed of the property, and it is impossible to get it back."

The jury returned a verdict of guilty, but the chairman being of opinion that there was no evidence of a felonious taking, when the prisoner first took the watch from the prosecutor's house, with the knowledge and in the presence of the prosecutor's wife, and entertaining doubt whether the prisoner's subsequent appropriation of the watch could, under the circumstances above detailed, constitute larceny, requests the opinion of this Court as to the correctness of the conviction in point of law.

SECOND CASE.

The same prisoner was also indicted at the same Sessions for stealing one watch, the property of the prosecutor, Thomas Reynolds. It appeared in evidence that the prisoner, who was a watchmaker at Malvern, received from the prosecutor some time in January, 1848, his silver watch to repair. The prisoner returned it to the prosecutor. A few days after the prisoner had so returned it, the prosecutor told the prisoner that the watch gained. The prisoner said that if the prosecutor would let him have it again, he would regulate it and return it in a day or two. The prosecutor thereupon gave the watch to the prisoner, who in eight or nine days left Malvern with the prosecutor's watch in his possession, and was not again heard of until he was arrested on the present charge some time afterwards.

The prosecutor was unable to say whether he had paid for the repairs of his watch or not, but stated that the prisoner, when he left Malvern, had other repairs of the prosecutor's on hand and unfinished.

The prisoner, when taken into custody, said, "I have disposed of the property, and it is impossible to get it back."

The jury found a verdict of guilty, but the chairman being of opinion that there was no evidence of a felonious taking on the part of the

prisoner, when he received the watch from the prosecutor to regulate it, and entertaining a doubt whether the subsequent departure of the prisoner from Malvern with the prosecutor's watch in his possession could, under the circumstances above detailed, constitute larceny, requests the opinion of this Court, as in the former case.

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These cases were not argued by counsel but were considered by the following judges: Pollock, C. B., Patteson, J., Wightman, J., Platt, B., and Talfourd, J.

POLLOCK, C. B., delivered the judgment of the Court. The indictment was for stealing a watch, and the circumstances set out in the case do not, on the question of fact, justify the verdict of guilty; but in giving our judgment that the conviction is wrong, we do not proceed merely upon the facts stated. The question put to us in the conclusion of the case seems to be this: The chairman doubted whether a subsequent appropriation could make the entire transaction a larceny, there not having been at the time of the taking any *animus furandi;* and I think we are bound to take it that he directed the jury that the subsequent appropriation might render the transaction larceny, though there was not any intention to steal at the time of the taking; and indeed the chairman's opinion seems to have been, that there was not the *animus furandi* at the time of the taking; and the question is, whether he was right in his direction. We think not, for unless there was a taking *animo furandi*, no dishonest appropriation afterwards could make it larceny. *Conviction reversed.*

REGINA *v.* PRATT,

6 Cox C. C. 373 [1854].

THE prisoner was tried at the last January Sessions for the borough of Birmingham, upon a charge of having feloniously stolen, taken, and carried away on the 18th May, in the 16th year of our Sovereign Lady the Queen, one die lathe, the goods of Edward Barker and another; and on the 19th May, in the same year, ten lathes, the property of the said Edward Barker and another, the goods and chattels of the prosecutors; and was found guilty.

The prisoner was a thimble maker and manufacturer, carrying on his business in two mills, one a thimble mill and the other a rolling mill, in the borough of Birmingham; and before the occurrence hereinafter mentioned, he was the owner and proprietor of the property mentioned in the indictment.

On the 14th of May, 1853, the prisoner, being in pecuniary difficul-

ties, arranged with the prosecutors, Edward Barker and William Wayte, creditors of the prisoner, and with Mr. Collis, an attorney-at-law who acted on their behalf, to execute an assignment to trustees for the benefit of his creditors; and on the 18th of May a deed of assignment was executed by him, whereby the prisoner assigned to the prosecutors, as trustees for the purposes therein mentioned, certain property by the description following: All and every the engines, lathes, boilers, furnaces, horses, carts, machinery, tools, and implements of trade, the stock-in-trade, goods, wares, merchandise, household furniture, fixtures, plate, linen, china, books of account, debts, sum and sums of money, and all securities for money, vouchers, and other documents and writings, and all other the personal estate and effects whatsoever and wheresoever, save and except leasehold estates of the said David Pratt, in possession, reversion, remainder, or expectancy, together with full and free possession, right and title of entry in and to all and every of the mills, works, messuages, or tenements and premises wherein the said several effects and premises then were: to have and to hold the said engines, and other the premises, unto the said William Barker and William Wayte, their executors, administrators, and assigns, absolutely.

The deed was executed by the prisoner in the presence of, and was attested by, James Rous, who was a clerk of Mr. Collis, and who was not an attorney or solicitor.

On the 29th of May the said deed was again executed by the prisoner in the presence of the said Mr. Collis and in all respects in conformity with the provisions of the 68th section of the Bankrupt Law Consolidation Act, 1849, with the view of preventing the deed from operating as an act of bankruptcy. The deed had been duly stamped on its first execution, but no second stamp was affixed on its second execution, which omission was made the ground of objection to its receipt in evidence. I admitted it however, subject to the opinion of this honorable court, which I directed should be taken if it became necessary. At the time of the first interview with Mr. Collis on the 14th of May, the prisoner said he had stopped work altogether, but on the 16th it was arranged between him and Mr. Collis that the rolling business should be allowed to go on to complete some unfinished work. Mr. Collis then told him to keep an account of the wages of the men employed on the rolling work and to bring it to the trustees. This the prisoner did on the 19th of May, when the wages were paid by the trustees and the rolling business finally stopped.

In the nights of Monday, the 16th of May, and of every other day during that week, the prisoner removed property conveyed by the deed — including the articles mentioned in the indictment — from the thimble

and rolling mills (some of the heavier machines being taken to pieces for the purpose of removal), and hid them in the cellar and other parts of the house of one of his workmen. Some time afterwards, and after the sale by the trustees of the remainder of the property, a Mr. Walker, who had been a large purchaser at the sale, recommenced the business at the thimble and rolling mills, and the prisoner acted as his manager, when the property which formed the subject of the indictment was by the prisoner's directions brought back at intervals to the mills.

No manual possession of the property was taken by the prosecutors prior to its removal from and back to the mills, but the prisoner remained in possession after the execution of the deed, in the same manner as before.

I asked the jury three questions: 1st. Did the prisoner remove the property after the execution of the deed of assignment? 2dly. Did he so act with intent fraudulently to deprive the parties beneficially entitled under the deed of the goods? 3dly. Was he at the time of such removal in the care of and custody of such goods as the agent of the trustees under the deed?

I put these three questions to the jury separately, and they separately answered them as follows: 1st. He did remove the property after the execution of the assignment. 2dly. He did so remove it with fraudulent intent. And lastly: He was not in the care and custody of the goods as the agent of the trustees. And thereupon (being of opinion that the two affirmative answers would support a conviction, notwithstanding the third answer in the negative), I directed the jury to find the prisoner guilty, which they did.

The questions for the opinion of the Court are: 1st. Whether the deed of assignment ought to have been received in evidence. 2d. Whether my direction to the jury was correct. And lastly: Whether the conviction is valid.

Bittleston (*Field* with him) for the prisoner. The conviction is wrong. 1st. The prisoner was in lawful possession of the goods, and a taking by him did not constitute larceny. *Furtum non est ubi initium habet detentionis per dominum rei.* The trustees had not even a constructive possession for this purpose, though they probably had for the purpose of maintaining a civil action of trespass against a third person. The doctrine of constructive possession underwent consideration in R. *v.* Reed, 23 L. J. 25, M. C., where a servant was sent to fetch coals; and it was held that the servant's possession was only determined when he had placed the coals in his master's cart, which was the same thing for that purpose as the master's warehouse. If this case is put upon the ground that the prisoner was a bailee and broke bulk, the jury have negatived a bailment. 2d. Under the 68th

section of the Bankrupt Act, the re-execution constituted a material alteration of the deed, which therefore required to be restamped. [Lord Campbell, C. J. Was not the re-execution a mere nullity?] Probably that is so.

A. Wills, contra. This is a case of bailment. The trustees permitted the prisoner to continue in possession, and by so doing constituted him a bailee. [Lord Campbell, C. J. The jury have found the contrary.] They have only found that he was not their agent; and there is a distinction between an agent and a bailee.

Lord Campbell, C. J. It is found that he had not the care or custody of the goods as their agent; and that clearly negatives a bailment; and that is the only ground upon which this case could be put. The prisoner, therefore, was in lawful possession of the goods and cannot be convicted of larceny.

Alderson, B. This is the case of a man stealing goods out of his own possession. *Conviction quashed.*

Section 3. Conventional Taking by Breaking Bulk.

Year-book 1473 (Easter), 13 Ed. IV. p. 9, pl. 5.[1] "In the Star Chamber before the King's Council such matter was shown and debated: where one has bargained with another to carry certain bales with, etc., and other things to Southampton, he took them and carried them to another place and broke up (*debrusa*) the bales and took the goods contained therein feloniously, and converted them to his proper use and disposed of them suspiciously; if that may be called felony or not, that was the case.

"Brian, C. J. I think not, for where he has the possession from the party by a bailing and delivery lawfully, it cannot after be called felony nor trespass, for no felony can be but with violence and *vi et armis*, and what he himself has he cannot take with *vi et armis* nor against the peace; therefore it cannot be felony nor trespass, for he may not have any other action of these goods but action of detinue.

"*Hussey, the King's Attorney.* Felony is to claim feloniously the property without cause to the intent to defraud him in whom the property is, *animo furandi*, and here notwithstanding the bailment *ut supra* the property remained in him who bailed them, then this property can be feloniously claimed by him to whom they were bailed as well as by a stranger; therefore it may be felony well enough.

[1] [The translation is that of Pollock and Wright, Possession, page 134.]

"THE CHANCELLOR. Felony is according to the intent, and his intent may be felonious as well here as if he had not the possession.

"MOLINEUX *ad idem*. A matter lawfully done may be called felony or trespass, according to the intent; *sc.* if he who did the act do not pursue the cause for which he took the goods, as if a man distrain for damage feasant or rent in arrear and then he sell the goods and kill the beasts, this is tort now where at the beginning it was good. So if a man come into a tavern to drink it is lawful; but if he carry away the piece or do other trespass, then all is bad. So although the taking was lawful in the carrier *ut supra*, etc., yet when he took the goods to another place *ut supra* he did not pursue his cause, and so by his act after it may be called felony or trespass, according to the intent.

"BRIAN, C. J. Where a man does an act out of his own head, it may be a lawful act in one case and in another not, according to his act afterwards, — as in the cases which you have put, — for there his intent shall be judged according to his act; but where I have goods by your bailment, this taking cannot be made bad after by anything.

"VAVISOUR. Sir, our case is better than a bailment, for here the things were not delivered to him, but a bargain that he should carry the goods to Southampton *ut supra*, and then if he took them to carry them thither he took them warrantably; and the case put now upon the matter shows, that is, his demeanor after shows, that he took them as felon and to another intent than to carry them, *ut supra*, in which case he took them without warrant or cause, for that he did not pursue the cause, and so it is felony.

"CHOKE, J. I think that where a man has goods in his possession by reason of a bailment he cannot take them feloniously, being in possession; but still it seems here that it is felony, for here the things which were within the bales were not bailed to him — only the bales as an entire thing were bailed *ut supra* to carry — in which case if he had given the bales or sold them, etc., it is not felony; but when he broke them and took out of them what was within he did that without warrant, as if one bailed a tun of wine to carry; if the bailee sell the tun it is not felony nor trespass; but if he took some out it is felony; and here the twenty pounds were not bailed to him, and peradventure he knew not of them at the time of the bailment. So is it if I bail the key of my chamber to one to guard my chamber, and he take my goods within this chamber, it is felony; for they were not bailed to him.

"(It was then moved that the case ought to be determined at common law; but the Chancellor seems to have thought otherwise, for the complainant was a merchant stranger, whose case ought to be judged by the law of nature in Chancery and without the delay of trial by jury.

However, the matter was afterwards argued before the judges in the Exchequer Chamber, and there) —

"It was holden by all but Nedham, J., that where goods are bailed to a man he cannot take them feloniously; but Nedham held the contrary, for he might take them feloniously as well as another: and he said it had been held that a man can take his own goods feloniously, as if I bail goods to a man to keep and I come privily — intending to recover damages against him in detinue — and I take the goods privily, it is felony. And it was holden that where a man has possession and that determines, he can then be felon of the things, as if I bail goods to one to carry to my house and he bring them to my house and then take them thereout, it is felony, for his possession is determined when they were in my house; but if a taverner serve a man with a piece and he take it away, it is felony, for he had not possession of this piece, for it was put on the table but to serve him to drink. And so is it of my butler or cook in my house; they are but ministers to serve me, and if they carry it away it is felony, for they had not possession, but the possession was all the while in me; but otherwise peradventure if it were bailed to the servants so that they are in possession of it.

"Laicon, J. I think there is a diversity between bailment of goods and a bargain to take and carry, for by the bailment he has delivery of possession; but by the bargain he has no possession till he take them, and this taking is lawful if he takes them to carry, but if he take them to another intent than to carry them, so that he do not pursue his cause, I think that shall be called felony well enough.

"Brian, C. J. I think that it is all one, a bargain to carry them and a bailment, for in both cases he has authority of the same person in whom the property was, so that it cannot be called felony, M. 2. E. III., in an indictment '*felonice abduxit unum equum*' is bad, but it should be *cepit;* so in eyre at Nott., 8 E. III; and in this case the taking cannot be feloniously, for that he had the lawful possession; so then the breaking the bales is not felony, *vide* 4 E. II. in trespass, for that plaintiff had bought a tun of wine of defendant, and while it was in defendant's guard defendant came with force and arms and broke the tun and carried away parcel of the wine and filled up the tun with water.

"And for that it appeared he had possession before, the writ, being *vi et armis*, was challenged; and yet it was held, well and he pleaded not guilty, and then the justices reported to the Chancellor in Council that the opinion of the most of them was that it was felony."

[Of the foregoing case Stephen (Hist. Crim. Law Eng. v. iii. p. 139), says: "Much the most curious case relating to theft in the Year-books is one which was decided in 1473, 13 Edw. IV. p. 9, No. 5. It seems to have excited the greatest atten-

tion, and to have been debated both in the Star Chamber and in the Exchequer Chamber. The question was whether a carrier who took elsewhere bales of goods entrusted to him to be carried to Southampton, and broke open the bales and carried off their contents, was guilty of felony or not. At the discussion in the Star Chamber, the chancellor was present and took a leading part. The owner of the goods was an alien merchant who had come with a safe conduct; and the chancellor maintained, among other things, that on this account he ought to sue, not according to the law of the land, but 'solonq. le ley de nature en le chancery.' He also maintained that felony depended on the intention of the party, and that, whether the dishonest person had the goods in his possession or not, his intention was equally felonious. It was finally decided that the act did amount to felony. The principle of the decision was that though a man cannot steal goods bailed to him (in which all the judges except Needham agreed), yet, if the bailee does an act which determines the bailment, he may steal the goods.

"In this case the carrier had determined the bailment by taking the goods to the wrong place and breaking open the bales.

"This has always appeared an extraordinary decision, as, to all common apprehension, theft of the whole thing bailed must determine the bailment quite as much as a theft of part of it. I think it obvious from the report that the decision was a compromise intended to propitiate the chancellor and perhaps the king. This required a deviation from the common law, which was accordingly made, but was as slight as the judges could make it. They would have liked to hold that where the original taking was lawful, no subsequent dealing with the property could be felonious. The chancellor, who seems to have had regard rather to the position of the owner of the goods than to the criminality of the carrier, seems to have wished to make the matter turn upon the moral character of the act of misappropriation. The judges resorted to the expedient of treating the breaking bulk as a new taking. They thus preserved the common-law definition of theft but qualified it by an obscure distinction resting on no definite principle."

It is possible enough, as Stephen thinks, that this decision may have been on the whole a concession on the part of the judges to the chancellor or the king. Prof. James B. Ames suggests, however, that Mr. Stephen is mistaken in his conclusion that a new idea or "deviation from the common law" was deliberately introduced. The judges who based their opinion on the breaking went expressly on a decided case, of the breaking of a tun of wine. The notion that one can have possession of the exterior casing of goods and not have possession of the goods within is not only well established in the modern law (Merry *v.* Green, Cartwright *v.* Green, above), but is a very ancient notion, both in England and independently on the Continent. I am indebted to Professor Ames for a reference to two early cases upon the point. One is in Year Book, 8 Edw. II. 275; the other is cited in Heusler, Institutionen des Deutschen Privatrechts, vol. 2, p. 192, and is as follows: —

"A complicated case, Brünner Schöffenbuch, c. 182, p. 91. A man deposits with a friend a chest in which he encloses a box containing jewels and money; but he himself keeps the keys of both chest and box. Upon opening the box he finds that the money is gone, and sues the depositary for reimbursement. The latter defends on the ground that the complainant had never entrusted the keys to him, but had kept them himself. Judgment is given against the complainant (Paulus), chiefly for the reason that, although he deposited the locked chest with the defendant, yet he retained the chest as well as the enclosures (jewel-box) to a certain extent in his own power and keeping."

In the given case, says Heusler, this decision agrees with the law, as is shown above; but the reasoning, taken by itself, goes too far, and might, for instance, give

color to the idea that, even if the whole chest had been stolen by a third party, the owner would have had no claim on the depositary for recompense, but would have been obliged to sue the third party himself, — which of course is not true. — Ed.]

REX *v.* BRAZIER,

Russ. & Ry. 337 [1817].

The prisoner was tried before Mr. Justice Holroyd at the summer Assizes for the town of Nottingham, in the year 1817, on an indictment for stealing fifteen bushels of wheat, of the goods and chattels of Thomas Neale.

Thomas Neale, a farmer, sent forty bags containing twenty quarters of his wheat to the prisoner, who was a wharfinger and warehouseman in the town of Nottingham, and who received the same into his warehouse there, for safe custody for the said Thomas Neale. The wheat was to lie there until sold by the prosecutor; the prisoner had no authority to sell it. It was proved that Neale did not give any authority to the prisoner to make any alteration in the wheat, or to open the bags in order to show them, or for any other purpose.

While the wheat thus remained in the prisoner's warehouse for safe custody and was the property of Neale, the prisoner's servant by the prisoner's order took eight of the bags, containing four quarters of the above wheat, from the rest, and shooting the wheat out of the bags upon the warehouse floor, mixed it with four bags of different wheat of an inferior quality and value. When so mixed, the whole was, by the prisoner's order, put into twelve other bags and afterwards sent away and disposed of by him for his own benefit. Afterward, by the prisoner's orders, the above four quarters of Neale's wheat were replaced with an equal quantity of the prisoner's wheat, of very inferior quality and value, by mixing the same with two quarters of the residue of Neale's wheat, and replacing the same when so mixed in the bags from whence the four quarters of Neale's wheat had been removed as before mentioned. Another part of Neale's wheat was in like manner fraudulently removed, mixed, and replaced by the prisoner's orders; and sixteen of the above bags, containing eight quarters of the wheat so mixed as before stated, were afterwards delivered by the prisoner to the vendee of Thomas Neale, as being part of the wheat deposited by Neale in the prisoner's warehouse.

It did not appear that there was any severing of part of the wheat in any *one* bag *from* the *residue* of the wheat *in* the *same* bag, with intent to steal or embezzle that part only that was so severed and not the residue in the same bag from which it was so severed.

The jury being of opinion that the facts above stated were proved, found the prisoner guilty of larceny; but the learned judge respited the judgment, and reserved the point for the consideration of the judges.

In Michaelmas term, 1817, eleven of the judges met and considered this case; they were unanimously of opinion that the conviction was right; that the taking the whole of the wheat out of any one bag was no less a larceny than if the prisoner had severed a part from the residue of the wheat in the same bag and had taken only that part, leaving the remainder of the wheat in the bag.[1]

REX *v.* MADOX,

Russ. & Ry. 92 [1805].

This was an indictment for a capital offence on the 24 G. II. c. 45, tried before Mr. Baron Graham at the summer Assizes at Winchester, in the year 1805.

The first count was for stealing at West Cowes six wooden casks and one thousand pounds' weight of butter, value £20, the goods of Richard Bradley and Thomas Clayton, being in a certain vessel called a sloop in the port of Cowes, the said port being a port of entry and discharge, against the statute. The second count was for grand larceny. The third count was like the first except as to the property in the goods, which was laid in one Richard Lashmore; and the fourth count was for grand larceny of the goods of the said Richard Lashmore.

The butter stolen was part of a cargo of 280 firkins or casks, shipped at Waterford, in Ireland, on board a sloop, the "Benjamin," of which the prisoner was master and owner, bound to Shoreham and Newhaven in Sussex, — two hundred and thirty of the casks being consigned to Bradley and Clayton at Shoreham and fifty of them to Lashmore at Brighthelmstone.

It appeared that the ordinary length of this voyage, with fair winds, was a week or nine days, but in winter sometimes a month or five weeks. In the present instance the voyage had been of much longer duration.

The vessel first touched at Sheepshead, in Ireland, in distress. The prisoner went on shore at Beerhaven, where he signed a protest, bearing date on the 20th December, 1804. From thence they proceeded to Lundy Island and to Tenby in Wales, where they arrived in February,

[1] *Vide* 2 East, P. C. 695, 6, 7, and 8. Spear's Case, 2 East, P. C. 568.

1805, and at which place the prisoner went on shore and stayed four or five weeks, the winds being foul. From thence they proceeded to Scilly and then to Cowes, where they arrived on the last day of March or the 1st of April, 1805. Cowes was in their course, but they had previously met with very foul weather and had been driven to the westward of Madeira, during which time the vessel had been often in great distress; but no part of the butter had at any time been thrown overboard. Upon the arrival at Cowes the prisoner went on shore and shortly afterwards applied to one Lallow, a sailmaker, for a suit of sails. Lallow went aboard the vessel and took measure for the sails; and after his return to Cowes the prisoner called upon him again and bespoke a hammock, and then stated that he had thirteen casks of butter on board the vessel, belonging to himself, and requested Lallow to send for them and deposit them in his sail-loft until the prisoner returned from Newhaven. At the same time he gave Lallow a note or order for the mate of the vessel, by which the mate was required to deliver thirteen casks of butter to the bearer. Lallow dispatched some of his men with the order and a boat to the vessel, where they arrived in the night, and after having delivered the order to the mate, received from him seven casks of butter in the first instance, being as much as the boat would carry; and upon their return to the vessel, during the night, received from the mate the other six casks. The order did not require the mate to deliver any particular casks; and it appeared by the evidence of the mate that he took them as they came to hand. The casks had been originally stowed in the hold and upon the half decks as they came on board, and those delivered to Lallow's men were taken from the half decks, the others being battened down. The seven casks first delivered by the mate were taken to Lallow's premises and deposited there; the other six casks were seized by the custom-house officers. The prisoner was at Cowes and was informed by Lallow of the seizure, at which he expressed anger, speaking of the seizure as a robbery and of the casks so seized as his own property and venture. He also spoke of going to claim his property and afterwards told Lallow that he would give him an order to claim it, as he must himself go away. The prisoner afterwards went to the vessel and passed the rest of the night on board. The remainder of the cargo was delivered at Shoreham and Newhaven.

The protest made by the prisoner and bearing date at Beerhaven, the 20th of December, 1804, purported, among other things, that the prisoner had been obliged to throw overboard several casks of butter; and it appeared that he had held the same language to the consignees as his excuse for delivering short of their respective consignments.

Upon this case the counsel for the prisoner raised two objections: first, that no larceny had been committed by the prisoner; and secondly, that the offence was not capital, — the larceny, if any, being of goods in his own vessel.

Upon the first objection it seemed to be admitted that if the mate, by the order of the prisoner, had broken bulk by taking the casks from those which were battened down, it might have been larceny in the prisoner; and the learned judge thought, that as the casks were taken from the half-deck, where they were originally stowed, there was no material difference. It was then contended that the prisoner went into Cowes without any necessity, and out of the course of his voyage; and the case was compared to those wherein it had been held, that if goods are delivered to a carrier to carry to a certain place, and he carries them elsewhere and embezzles them, it is no felony.[1] But the learned judge thought that the severance of a part from the rest, and the formed design of doing so, took the case out of those authorities, if they could be considered as applying to the present case.

Upon the second objection, those cases were cited wherein it had been held that the 12th Anne St. 1, c. 7, against larceny in a dwelling-house, to the value of forty shillings, does not extend to a stealing by a man in his own house;[2] but the learned judge thought, that though this might be the law as to a person stealing the goods of another under the protection of his own house, yet the case of a man stealing the goods of another laden on board his own vessel was different, as in such case the vessel for the voyage might be considered as the vessel of the freighter; and that if the owner should take the command of the vessel, the stealing the goods committed to his care would be an aggravation of his offence. And he further observed that the words and occasion of the two statutes would admit of a distinction.

The whole case was therefore left to the jury, who found the prisoner guilty; but the sentence was respited, in order that the opinion of the judges might be taken.

In Michaelmas term, 1805, the case was considered by the JUDGES, who were of opinion that it was not larceny; and that if it were larceny, it would not have amounted to a capital offence within the statute 24 G. II. c. 45.

[1] 1 Hale, 504, 505. 2 East, P. C. 693, 695, 696.
[2] 2 East, P. C. 644.

COMMONWEALTH *v.* JAMES,

1 PICK. 375 [1823].

AN indictment was found in this case as follows: . . . "The jurors, etc., present, that Noah James, of, etc., miller, on, etc., at Boston aforesaid, with force and arms, three tons weight of barilla of the value, etc., of the goods and chattels of one Thomas Park, in his possession then and there being, did then and there feloniously steal," etc.

The prisoner was convicted and sentenced at the Municipal Court and he appealed to this Court.

At the trial in November term, 1822, before Parker, C. J., it was in evidence that Park having a quantity of barilla which he wished to have ground, sent it to a mill kept by the prisoner for grinding plaster of Paris, barilla, and other articles; that after it was ground, a mixture consisting of three fourth parts of barilla and one fourth part of plaster of Paris was returned by the same truckman who carried the barilla to the mill, he being on both occasions in the employment of Park.

The prisoner's counsel contended, that it appearing that the barilla was sent to and brought from the mill by a truckman, who for aught appearing in the case was alive and within the reach of the process of the court at the time of trial, without his testimony there was no legal proof that the barilla was ever delivered to the prisoner or the mixture received from him. But there being evidence that the barilla was ground at the prisoner's mill, by his order, he being sometimes present, and a bill of the expense of grinding having been made out and presented by him and the money received by him, there being also evidence tending strongly to show that he had practised a fraud upon the barilla, the objection was overruled; and whether the mixture was accidental or fraudulent, and whether it was caused by the prisoner or not, were questions left to the jury to decide, upon a great deal of circumstantial evidence, no person having seen him do it, and the laborer who had the immediate charge of the grinding having sworn that no mixture was made except what was accidental.

It was likewise contended, that supposing the facts to be as the evidence on the part of the government tended to prove them, the case made out was not larceny but only a breach of trust, or at most a fraud, with which the prisoner was not charged in the indictment. On this point the jury were instructed that if they were satisfied from the evidence that the prisoner had taken from the parcel of barilla any quantity with a view to convert it to his own use, introducing into the

mass an article of inferior value for the purpose of concealing the fraud, he was guilty of larceny.

The jury having found a verdict against the prisoner, he moved for a new trial on account of these directions of the judge.

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PUTNAM, J., delivered the opinion of the Court.

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But the main question still remains to be considered; that is, whether the facts which have been proved will warrant a conviction for larceny.

Before proceeding to that, I would remark that the question has been argued by the counsel for the defendant with great learning and ability, and that we have been much assisted by their researches.

To constitute the crime of larceny, there must be a felonious taking and carrying away of the goods of another. It is supposed to be *vi et armis*, *invito domino*. But actual violence is not necessary; fraud may supply the place of force.

The jury have found that the defendant took the goods with an intent to steal them; and the verdict is well warranted, if at the time the defendant took them, they were not lawfully in his possession with the consent of the owner, according to a subsisting special contract, in consequence of an original delivery obtained without fraud. If that was the case, the inference which the counsel for the defendant draw would follow, that such a taking would not be felony but a mere breach of trust, for which a civil action would lie but concerning which the public have no right to inquire by indictment.

The counsel for the defendant have referred us to 13 Ed. IV., fol. 9, as the authority upon this point. The case was as follows. A carrier had agreed to carry certain bales of goods which were delivered to him to Southampton, but he carried them to another place, broke open the bales, and took the goods contained in them feloniously, and converted them to his own use. If that were felony or not was the question. It was first debated in the Star Chamber, where four of the judges held it to be felony, but for different reasons; and one of the judges (Brian) strenuously insisted that it was neither felony nor trespass, because the defendant had the possession by a lawful delivery. The chancellor thought it was felony and should be determined according to the intent. Molineux thought it might be felony or trespass, according to the intent, and seems to put the case upon the ground of a determination of the contract. "As if he who did the act does not pursue the purpose for which he took the goods; as if a man distrain for damage-feazance, or rent arrere, and afterwards sell the goods, or kill the beasts, there is a tort now, where at the beginning it was good.

So although it was lawful to carry the goods *ut supra*, yet as he took the goods to another place afterwards, he has not pursued the original purpose, and so by his own act afterwards it shall be adjudged felony or trespass, according to his intent." Vavisour did not consider it as a bailment, but that the goods were delivered upon a bargain; that his *original intent* was to steal and not to carry the goods. "His conduct afterwards proves," says Vavisour, "*that he took them as a felon*, and *to another intent than to carry*, etc." Choke put the case upon the breaking of the bales and taking out the contents. His opinion was that if the party had sold the entire bales it would not have been felony, "but as he broke them and took what was in them, he did it without warrant," and so was guilty of felony.

Afterwards this matter was argued before the judges in the Exchequer Chamber, and this proposition was held by all (excepting Nedham), namely, "that where goods are delivered to a man, he cannot take them feloniously." Nedham thought that "he might take them feloniously as well as another." Brian still persisted in his opinion and said that the breaking of the bales did not make it felony. But afterwards the judges made a report to the chancellor that the opinion of the majority of them was, that it was felony.

I have been thus minute in examining this case, as it is referred to as the foundation upon which many subsequent decisions rest. It will be perceived that here may be found the distinctions which are recognized in the text books upon this subject. Thus, if the party obtain the delivery of the goods originally without an intent to steal, a subsequent conversion of them to his own use while the contract subsisted would not be felony; but if the original intent was to steal, and the means used to obtain the delivery were merely colorable, a taking under such circumstances would be felony. So if the goods were delivered originally upon a special contract, which is determined by the fraudulent act of him to whom they were delivered, or by the completion of the contract, a taking *animo furandi* afterwards should be adjudged to be felony.

In the application of these general rules to the cases which arise, it is obvious that shades of difference, like the colors of the rainbow, so nearly approach each other as to render it extremely difficult to discriminate them with satisfactory precision. The humane rule of the law is, that in cases of doubt the inclination should be in favor of the defendant. The seeming, perhaps real, contradictions to be met with in the English decisions may have been influenced by the desire to save human life.

The case of Rex *v.* Channel, 2 Str. 793, cited for the defendant, was an indictment against a miller employed to grind wheat, stating

that he with force and arms *unlawfully* did take and detain part of it. The indictment was held bad upon demurrer. The reasons assigned in the book are, that there was no actual force laid and that this was a matter of a private nature; but a better reason seems to us to have been that there was no averment that the defendant took the wheat *feloniously*.

The case of The King *v.* Haynes, cited for the defendant from 4 M. & S. 214, was an indictment for a fraud against a miller for delivering oatmeal and barley instead of wheat which was sent to be ground. It is not for a felony. The Court thought no indictable offence was set forth. The question whether if the miller had taken any of the corn, which was sent to be ground, *with an intent to steal it*, was not under consideration.

In the case at bar, the goods came lawfully into the hands of the defendant by the delivery of the owner. If he is to be convicted, it must be on the ground that he took the goods as a felon after the special contract was determined.

I will refer to some cases which illustrate this point. Thus, in Rex *v.* Charlewood, before Gould, J. and Perryn, B., 1786, cited in East's Cr. L., 689, reported in Leach, Case 180, the jury were instructed, that if they thought the prisoner performed the journey for which he hired the horse and returned to London, where instead of delivering it to the owner, he afterwards converted it to his own use, that might be felony; "for," said the Court, "the end and purpose of the hiring of the horse would be over."

In Kelyng, 35, a silk throwster had men to work in his own house and delivered silk to one of them to work, and the workman stole away part of it; and it was held to be felony notwithstanding the delivery. East, in his Crown Law, supposes that if the silk had been delivered to be carried to the house of the workman, and he had there converted a part of it to his own use, it could not have been felony; but that as it was to be worked up in the house of the owner, it might be considered as never in fact out of his possession. But Kelyng seems to put the case upon the ground of the special contract, "that the silk was delivered to him only to work, and so the entire property remained in the owner."

But whatever may be the true ground of decision in that case, there is a case in 1 Roll. Abr. 73, pl. 16, which is recognized as good law by Hawkins, East and other writers, which is very applicable to the case at bar. "If a man says to a miller who keeps a corn mill, thou hast stolen three pecks of meal, an action lies; for although the corn was delivered to him to grind, nevertheless if he steal it, it is felony, being taken from the rest." Langley *v.* Bradshawe, in Error, 8 Car. B. R.

That decision proceeded upon the ground of a determination of the privity of the bailment. Hawkins observes (bk. i. c. 33, § 4) that such possession of a part distinct from the whole was gained by wrong and not delivered by the owner; and also, that it was obtained basely, fraudulently, and clandestinely.

This remark is peculiarly applicable to the case at bar; for there is no evidence that the owner intended to divest himself of his property by the delivering of it to the defendant. The defendant did not pursue the purpose for which it was delivered to him but separated a part from the rest, for his own use, without pretence of title; and by that act the contract was determined. From thenceforward the legal possession was in the owner, and a taking of the part so fraudulently separated from the rest, *animo furandi*, must be considered as larceny.

REGINA *v.* POYSER,

2 Den. C. C. 233 [1851].

CROWN CASE RESERVED.

The prisoner was tried before Mr. Baron Alderson, for larceny, at the spring Assizes, A. D. 1851, for the county of Leicester. It appeared at the trial that the prisoner was employed by the prosecutor, who was a tailor, to sell clothes for him about the country, and upon the following terms: The prosecutor fixed the price of each article, and the prisoner was entrusted to sell them at that fixed price, and when he had done so he was to bring back the money and the remainder of the clothes unsold, and was to have three shillings in the pound on the moneys received for his trouble. On the 12th of February last he took away a parcel of clothes upon these terms, and instead of disposing of them according to the above arrangement, he fraudulently pawned a portion of them for his own benefit, and having so done he afterwards fraudulently appropriated the residue to his own use. These facts having appeared, the learned baron directed the jury, that the original bailment of the goods by the prosecutor to the prisoner was determined by his unlawful act in pawning part of them, and that the subsequent fraudulent appropriation by the prisoner of the residue of the goods to his own use would in point of law amount to larceny. Upon this direction the prisoner was found guilty.

O'Brien for the prisoner.

The contract with the prisoner was distinct and separate with regard

to each article entrusted to him. The fact of his receiving all the articles at one time was a mere accident, which makes no legal difference in the case; each article had a separate price affixed to it. After he had pawned some of the articles, when was the original bailment of the others determined?

LORD CAMPBELL. The case states, that on the 12th of February, he took away *a parcel of clothes;* we must, therefore, regard the delivery of that parcel as one bailment of all the articles contained in the parcel.

O'Brien. The prisoner had authority to break the bulk; the contract imposed on him the necessity of opening it in order to take out each article and deal with it separately.

COLERIDGE, J. Why may not there be a single contract embracing several particulars, as for instance, where a carrier is entrusted with various articles to leave at different places, all of which articles are placed in one bag; if he wrongfully deals with any one, is it not a breaking bulk of the whole?

O'Brien. The doctrine of breaking bulk turns on there being no authority to open the parcel and deal with any one of the articles separately from the rest.

ALDERSON, B. If you can make out this to be like the case of a carrier entrusted with several parcels under several distinct contracts, then certainly it is no larceny.

LORD CAMPBELL, C. J. I think the conviction was right. The case must be considered as though it was a single bailment. If there had been several bailments, then the wrongful dealing with one of the articles so bailed would not affect the case as to any other article. But it makes no difference that in one parcel there were several articles. The law has resorted to some astuteness to get rid of the difficulties that might arise in the case of a wrongful dealing with one or more of several articles, all of which, when entrusted, had been contained in one bulk.

ALDERSON, B., and PLATT, B., concurred.

COLERIDGE, J. The fact of different prices being affixed to each article makes no difference in the case.

Section 4. The Question of Possession as between Master and Servant.

REX *v.* MURRAY,

1 Moody C. C. 276 [1830].

The prisoner was tried before T. Denman, Esq., Common Serjeant, at the Old Bailey Sessions in June, 1830.

The indictment stated that the prisoner, being a clerk in the employ of A., did, by virtue of such employment, receive and take into his possession the sum of £3 for and on account of his said master, and did afterwards fraudulently and feloniously embezzle 10*s.*, part of the sum above mentioned; and so the jurors say that the prisoner did feloniously steal, take, and carry away from the said A. the said sum of 10*s.* of the moneys of the said A. The prisoner was proved to be a clerk in the employ of A.; he received from another clerk £3 of A.'s money that he might pay (among other things) for inserting an advertisement in the Gazette; the prisoner paid 10*s.* for the insertion, and charged A. 20*s.* for the same, fraudulently keeping back the difference, which he converted to his own use.

The prisoner's counsel contended that this evidence did not support the indictment, 2 Russ. 1233, 1st edition.

The learned Common Serjeant directed the jury to find the prisoner guilty if they thought the evidence proved the facts above set forth, which they did; and he therefore now respectfully requested the opiuion of the learned judges whether the facts sustain the indictment.

At a meeting of the Judges after Trinity term, 1830, at which all the learned judges were present, this case was considered, and they thought the case not within the statute, because A. had had possession of the money by the hands of his other clerk, and that the conviction was therefore wrong.

REGINA *v.* MASTERS,

1 Den. C. C. 332 [1848].

. . . . . .

Orlando Masters, a clerk in the employment of William Holliday, was tried at the Michaelmas Quarter Sessions, A. D. 1848, for the borough of Birmingham, on an indictment charging him with embezzling

three sums of money received by him for and on account of his master, the prosecutor.

It appeared in evidence that the course of business adopted by the house was for the customers to pay moneys into the hands of certain persons, who paid them over to a superintendent; he accounted with the prisoner and paid over such moneys to him, and the prisoner, in his turn, accounted with cashiers and paid over the moneys to them, he having no other duty to perform with respect to such moneys than to keep an account which might act as a check on the superintendent and the cashiers, their accounts being in like manner checks upon him. These four parties to the receipt of the moneys are all servants of the prosecutor.

With respect to the three sums in question, it was proved that they passed in due course from the customers through the hands of the immediate receivers and the superintendent to the prisoner, who wilfully and fraudulently retained them.

On behalf of the prisoner it was objected, on the authority of Rex v. Murray, 1 Moody's C. C. 276, that the moneys having, before they reached the prisoner, been in the possession of the prosecutor's servants, did in law pass to the prisoner from his master, and that consequently the charge of embezzlement could not be sustained.

For the Crown it was answered that the prisoner having intercepted the moneys in their appointed course of progress to the master, this case was not governed by that of Rex v. Murray, where the prior possession of the master having been as complete as it was intended to be, the money might reasonably be considered as passing from the master to the prisoner, whereas in the present case it was in course of passage through the prisoner to the master.

The Recorder left the case to the jury, reserving the point.

The prisoner was convicted and sentenced to twelve months' imprisonment, with hard labor.

This case was argued before POLLOCK, C. B., PATTESON, J., MAULE, J., CRESSWELL, J., ERLE, J., on the 11th of November, 1848, at the first sitting of the Court created by Stat. 11 & 12 Vict. c. 78.

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POLLOCK, C. B. The Court are unanimously of opinion that no further argument is necessary. This case is quite different from that of R. v. Murray, 1 Moody C. C. 276. There the case was not within the Stat. 7 & 8 Geo. IV. c. 29, § 47, because the master had had possession of the money by the hands of another servant; and when it was given to the prisoner by that servant to be paid away on account of the master, it must be deemed in law to have been so given to the prisoner by his master; the fraudulent appropriation of it, being thus a

tortious taking in the first instance, was not embezzlement but larceny. But here the money never reached the master at all; it was stopped by the prisoner on its way to him. The original taking was lawful, and therefore the fraudulent appropriation was embezzlement.

REGINA *v.* WATTS,

2 DEN. C. C. 14 [1850].

CROWN CASE RESERVED.

[THE prisoner was convicted of "stealing a piece of paper, the property of Goldsmid and others his masters."]

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It appeared that he had for many years been employed as a salaried clerk in the office of the Globe Insurance Company, and that he was also a shareholder in the concern. The affairs of the company, which is an unincorporated co-partnership, are managed by a body of directors chosen out of the shareholders; and at the time when the alleged offence was committed, Edward Goldsmid was chairman, and William Tite deputy chairman of the directors, and George Carr Glyn was treasurer. The directors appoint and dismiss clerks and other servants, and fix their salaries and the particular duties to be discharged by them; and the directors have the charge and custody of all books and papers belonging to the company. The salaries of the clerks are paid out of the funds of the company.

The company had a drawing account at the bank of Glyn & Co., and were in the habit of sending their pass-book on Tuesday in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned, together with the checks and bills paid during the preceding week.

The prisoner was the person whose duty it was to receive the pass-book and vouchers from the messenger, and it was his duty upon receiving them to compare the entries in the pass-book with the books of the company, and to preserve the vouchers for the use of the company if wanted on any future occasion. On the 26th of February, the prisoner paid into the London and Westminster Bank for his own account (which he kept there) a check for £1,400 purporting to be drawn by the Globe Insurance Company on Glyn & Co., together with other checks for the London and Westminster Bank entered to the debit of the Globe Assurance Company in their pass-book, and delivered, together with the book, on the following Wednesday to the messenger of the company, who delivered the book and check to the prisoner in the usual way. On the 4th of March, in consequence of some suspicion

attaching to the prisoner, a search for the check for £1,400 was made during his absence among the vouchers in his keeping, and it could not be found. His papers were then sealed up, and he, on finding such a step was taken, said he would not remain there and quitted the office.

The pass-book was examined, and there the entry of the check for £1,400 had been erased, and the check was never found.

There was no evidence to show that any person on behalf of the company had ever drawn the check in question, or that it had been drawn upon paper stolen from the company.

. . . . . .

The jury found [the prisoner] guilty of stealing a piece of paper, and a case was reserved for the opinion of this Court whether the direction was right or not.

. . . . . .

WILDE, C. J. read the following judgment: —

We have considered this case and are all of opinion that the counts in the indictment, which charge the stealing a piece of paper, the property of Goldsmid and others, the masters of the prisoner, are supported by the evidence.

By the statement of the case, it appears that Goldsmid and others are the directors of the company, and that by its constitution they have the appointment and dismissal of the servants in the employ of the society, that they fix and pay their salaries, and also fix the duties they are to perform. The prisoner was a salaried clerk in the office, and therefore he was their servant.

They have also the ultimate charge and custody of the documents of the company; and by the course of business between the company and its bankers, the paid checks were returned to the directors, were part of the company's documents, and became the vouchers of the directors, and their property as such directors. The paper in question was one of these. One of the prisoner's appointed duties was to receive and keep for his employers such returned checks; any such paper, therefore, in his custody would be in the possession of his employers. The paper in question therefore, as soon as it had passed from the hands of the messenger and arrived at its ultimate destination, the custody of the prisoner for the directors, was really in their possession, and when he afterwards abstracted it for a fraudulent purpose, he was guilty of stealing it from them; as a butler who has the keeping of his master's plate would be guilty of larceny, if he should receive plate from the silversmith for his master, at his master's house, and afterwards fraudulently convert it to his own use, before it had in any other way than by his act of receiving come to the actual possession of the master.

This case is distinguishable from those in which the goods have only been in the course of passing toward the master, as in R. *v.* Masters, 1 Den. C. C. 332, where the prisoner's duty was only to receive the money from one fellowservant and pass it on to another, who was the ultimate accountant to the master. Here the paper found had reached its ultimate destination when it came to the prisoner's keeping, and that keeping, being for his masters, made his possession theirs.

In this view of the case, no difficulty arises as to part ownership from the fact that the prisoner was a shareholder in the company; as such he had no property in this paper.

CHAPTER XXVI.

LARCENY.

GETTING POSSESSION BY INOPERATIVE CONSENT OR BY ACQUIESCENCE.

SECTION 1. BY CONSENT INOPERATIVE THROUGH FRAUD.

TAKING BY TRICK OR DEVICE.

REGINA *v.* BUNCE,

1 F. & F. [523].

THE prisoner, a gypsy woman, surrendered to take her trial upon a charge of stealing £10 9*s.* 4*d.*, and various articles, the property of John Prior, at Witney, on the 13th of January, 1859.

. . . . . .

The prisoner was a gypsy woman who had succeeded in getting a large amount of property from the wife of the prosecutor, by pretending that she possessed supernatural powers and was able to procure for her dupe the sum of £170. On the 12th of January last, the prisoner went to the house of the prosecutor (who was out), saw his wife, and addressed her, saying, "Mrs. Prior, you are looking very ill. I have got something to tell you. There is some property left for you that you have been cheated out of and I can get it for you." The prisoner then said that she had got a book and she could raise the spirits and lay them if Mrs. Prior would put half a crown on a certain spot in the book which she pointed out. Mrs. Prior said to the prisoner that she had heard of such things, and she thought that spirits could be raised, and was induced to put some money in the book.

The prisoner went away and returned the next day, and said she had been working all night, and that her husband's money would not do, and she must have sovereigns; and she then required her to give her all the money she had got, and promised she would bring it back the next Monday, and also the sum of £170, which she said belonged to her. On these representations, the wife gave her all the money she could get, amounting to £10 9*s.* 4*d.* Mrs. Prior, who appeared to be a very nervous woman, and afraid, even now, to look at the prisoner in the dock, said she was so frightened at what the prisoner told her, that she felt she must go and get the money she wanted, and that she let her have it because she believed from what she said she could do her good or evil and was so afraid of her. When Mrs. Prior gave the prisoner the money, she required a shift to wrap the money up in and also Mrs. Prior's shawl. These were given her, on her promise to return them on the Monday. The prisoner then wanted a cloth to fasten it all up in, saying she must bury it. This was given, and also Mrs. Prior's gold wedding-ring, a silver thimble, a brass ring, and five old silver coins, the prisoner saying she must have everything Mrs. Prior had got that was valuable. All these things were given to the prisoner on her promise to bring them all back on the Monday, together with the £170, and to have a cup of tea. The prisoner was to have £5 for her trouble. She never returned and was taken into custody, on the 12th February, with Mrs. Prior's shawl upon her. On her cross-examination, Mrs. Prior said the prisoner always came when her husband was out and that she had never told him anything about it. A friend of the prisoner's had since returned £5 to the prosecutor and had promised £3 more.

Griffits (*to the jury*) contended there was nothing to show that she had got possession of the goods with a felonious intent, but only with a view to practise her art as a witch, in which the prosecutrix, like many other people, was foolish enough to believe, and possibly the prisoner may have believed. And if this was the original intention, then, although it was afterwards altered, there would be no larceny.

Channell, B., to the jury. It is for you to say whether or not the prisoner obtained possession of the goods with a felonious intent. If the original intention was as suggested, there would be no larceny; but if it was a mere trick to get the goods with no intention to return them it would be larceny. *Verdict, guilty.*

REGINA *v.* BUCKMASTER,

16 Cox C. C. 339 [1887].

This was a case stated for the opinion of the Court by the Chairman of the Court of Quarter Sessions for the County of Berks, which was as follows: —

1. At the General Quarter Sessions for the County of Berks, held on the 27th day of June, 1887, Walter Buckmaster was tried before me upon an indictment, omitting formal parts, which charged that he did on the 9th day of June, 1887, feloniously steal, take, and carry away certain money of the moneys of John Rymer.

2. It was proved that the prisoner and another man, at about 3 p.m., on the 9th day of June last, during the Ascot Race Meeting, were the only persons standing upon a platform or stand made to represent "safes," or iron safe chests. The words "Griffiths, the Safe Man," were printed upon it. The stand was outside the course, on a spot on Ascot Heath where carriages were placed, and was not within any betting inclosure or ring.

3. The prisoner, with a book in his hand, was calling out, "Two to one against the field," just before a race was about to be run. Rymer went up to him and asked, "What price Bird of Freedom?" to which he replied, "Seven to one to win." Rymer then deposited five shillings with Buckmaster, who told him that if the horse won he (Rymer) would win thirty-five shillings and get his own five shillings back. He also deposited another five shillings with Buckmaster, who told him that he would have fifteen shillings back, including his own five shillings, if the horse was first or second. The man who was with Buckmaster and was acting with him, received the money, and the latter, with whom all the conversation took place, appeared to take down the bet in his book and gave Rymer a card-ticket with the words "Griffiths, Safe Man" upon it.

4. While the race was being run, the prisoner and the other man were seen by one of the witnesses to walk quietly away. They were followed for about twenty yards, and on the witness at once returning the stand had gone. The horse "Bird of Freedom" won the race, and thereupon Rymer went back to the place where the stand had been, and he found that the prisoner and the other man had gone. He waited there for half an hour and then left. Much later in the afternoon Rymer saw the prisoner on another part of Ascot Heath and said, "I want £2 15*s.* from you." The prisoner said he knew nothing about it.

Upon being told by Rymer that he would be detained, he admitted the bet and said he had not the money, but that he was only the clerk and could take the prosecutor to the man who had it. He was then taken into custody, and upon him were found card-tickets with the words "Griffiths, the Safe Man" upon them. It was elicited from Rymer in cross-examination that he would have been satisfied if he did not receive back the same particular coins he had deposited.

5. At the close of the case for the prosecution, on behalf of the prisoner it was submitted that Rymer having parted voluntarily with the money there was no evidence of larceny nor of any taking by prisoner, and none of obtaining by false pretence or trick.

The learned chairman declined to withdraw the case from the jury, but assented to state this case. No evidence at all was called on the part of the prisoner, and a verdict of guilty was returned.

The question for the opinion of the Court was whether there was any evidence to be left to the jury.

Keith-Frith for the prisoner. In this case the prisoner might perhaps have been convicted of obtaining money by false pretences. But he has not been indicted for false pretences; and although upon an indictment for false pretences a prisoner can be convicted of larceny, he cannot upon an indictment for larceny be convicted of false pretences. There was no larceny here, because here there was no taking *invito domino*. [LORD COLERIDGE, C.J. Why cannot it be larceny by a trick?] In larceny by trick, although the possession is parted with, the ownership does not pass. But here the prosecutor did intend to part with the ownership of the specific coins he gave the prisoner, and therefore the ownership in them passed. [HAWKINS, J. No; the prosecutor merely intended to give the prisoner the coins as a deposit to abide the event of the race.] If that were so, then the person who makes a bet with a Geo. III. sovereign can insist upon that particular coin being returned to him if he wins. [SMITH, J. Although the whole thing was a sham, do you say that the prosecutor intended to part with his coin?] No; but if the ownership was obtained by means of a trick as well as the possession, the prisoner ought to have been indicted for false pretences. Here the prosecutor said he would have been satisfied had he not got the same coins back; therefore he clearly intended that the property in the particular coins should pass. [HAWKINS, J. Is not Rex *v.* Robson, Russ. & Ry. 413, an authority that the property did not pass under the circumstances?] No; for there the notes were never intended to be changed; they were merely deposited as a stake. Suppose here that Bird of Freedom had lost, the prisoner would have been entitled to keep the 5*s*. and could not have been indicted for stealing his own property; and therefore as the

property passed there could be no larceny, and the conviction should be quashed.

Lord Coleridge, C. J. I am of opinion that in this case the conviction is right and should be affirmed. The only question left to us by the learned chairman is, whether there was any evidence that the prisoner had been guilty of larceny to be left to the jury. In my opinion, there was abundant evidence from which the jury might infer that the prisoner was guilty. On behalf of the prisoner it has been argued that there is no doubt that the money was intended to be parted with, and that not only was the possession of the money parted with but the property in it was also intended to be parted with; and that therefore, as the property was intended to be parted with, there could be no larceny, but only the offence of obtaining money by false pretences; and that, although the prisoner, if he had been indicted for the false pretences, could have been convicted of larceny, the converse does not hold good, and he cannot, upon an indictment for larceny, be convicted of obtaining money by false pretences. To that there seems to me to be two answers: the first, that, supposing there was an intention on the part of the prosecutor to part with the property in the coin, in order to pass the property from him to the prisoner there must have been a contract under which it could pass; for a change of property could only have taken place by virtue of a contract of some sort, and a contract, by the very meaning of the word, must be the bringing together of two minds. Now, here there never was any bringing together of the minds of the prosecutor and the prisoner in the shape of a contract; for supposing the prosecutor to have intended to have parted with his money, he only intended to do so on the assumption that the prisoner intended to deal honestly with the money; whereas, on the contrary, the prisoner never intended to do that, but as the evidence shows clearly, intended to do that which the prosecutor never for a moment consented to. No contract ever existed therefore; and there is high authority that, under such circumstances, the property in the article does not pass. In Rex *v.* Oliver, Russ. on Crimes, vol. ii. p. 170, which was a case tried before Wood, B., the prosecutor there had a quantity of bank notes, which he wanted to change, and the prisoner offered to change them for him. The prosecutor gave him the bank notes, on which the prisoner decamped, and the prosecutor never got any money in return. It was argued that, as the prosecutor clearly intended to pass the property in the bank notes to the prisoner, he could not be convicted of larceny. But Wood, B., held that the case clearly amounted to larceny if the jury believed that the intention of the prisoner was to run away with the notes and never to return with the gold, and that whether the prisoner had at the time the *animus furandi*

was the sole point upon which the question turned, for if the prisoner had at the time the *animus furandi*, all that had been said respecting the property having been parted with by the delivery was without foundation, as the property in truth had never been parted with at all. The learned judge further said that "a parting with the property in goods could only be effected by contract, which required the assent of two minds; but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner, the prosecutor only meaning to part with his notes on the faith of having the gold in return, and the prisoner never meaning to barter but to steal." It appears to me that that is not only good sense but very sound law, and it is decisive of the point raised here. I am of opinion therefore that there is evidence of larceny here, and that the true view to take of this case is that the property did not pass. The second answer appears to me to be found in the case of Rex *v.* Robson, Russ. & Ry. 413, which is even more like this case than the case I have already cited. In Rex *v.* Robson the prosecutor was induced by the prisoner's confederates to make a bet with one of them and to part with a number of bank notes to another of the confederates, who passed it on to the prisoner to hold as stakeholder. The prosecutor having apparently lost the bet, the money was given by the prisoner to the confederate with whom the bet was made, and he went away. Upon these facts it was held that, where there is a plan to cheat a man of his property under color of a bet and he parts with the possession only to deposit the property as a stake with one of the confederates, the taking by such confederates is felonious. The case was tried by Bayley, J., who told the jury that if they thought, when the notes were received, there was a plan and concert between the prisoners that the prosecutor should never have them back but that they should keep them for themselves, under the false color and pretence that the bet had been won, he was of opinion that in point of law it was a felonious taking by all. The jury convicted, but the learned judge thought proper, as the case came very near Rex *v.* Nicholson, 2 East, P. C. 669, to submit it to the consideration of the judges, making the distinction between the cases that in Rex *v.* Robson, at the time the prisoners took the prosecutor's notes, he parted with the possession only and not the property; and that the property was only to pass eventually, if the confederate really won the wager; and that the prosecutor expected to have been paid had the confederate guessed wrongly. Ten of the judges considered the case and held the conviction right, because at the time of the taking the prosecutor parted only with the possession of the money. Now, the true view of the case here is exactly like the view which the judges took in that case. In this case the prosecutor deposits money with the prisoner,

never intending to part with that money, but being told that in a certain event he was to have that money and something more added to it given back to him. The prisoner, on the other hand, took the money, never intending to give it back, and decamped with it. It appears to me, therefore, that the possession only of the money was parted with, and that the prosecutor never intended to part with the property in it. No doubt had he had money given back to him, he would not have inquired into the question whether his own 5*s*. came back to him or not. But that does not affect the question whether, when he placed the coins in the prisoner's hands, he intended to pass the property in them to the prisoner. At all events there was plenty of evidence from which the jury could find that such was not his intention; and in my opinion the conviction should be affirmed.

POLLOCK, B. I have nothing to add.

MANISTY, J. I have very few words to say. I take it on the authorities cited by my lord that it is settled law that if a man parts with the possession of money but does not intend to part with the property in it, and the person receiving the money intends at that time to steal the money in a certain event, that there then is larceny. That is the ground on which I think that, as in this case the prosecutor never intended to part with his 5*s*. except in the event which did not occur and the prisoner never intended to return the money, the prisoner was guilty of larceny.

HAWKINS, J. The only question for our determination is, whether there was any evidence to go to the jury. I am of opinion that there was abundant evidence. I think the evidence pointed to this, that the whole of the prisoner's conduct pointed to an original and preconcerted plan of the prisoner to obtain possession of and keep the money of the prosecutor; and that the prosecutor never intended on such terms to part with the property in his 5*s*. I think therefore that there was abundant evidence of larceny in this case, and that the conviction should be affirmed.

SMITH, J. I think that it is clear the prosecutor never intended to part with the property in the 5*s*. except on condition that a *bona fide* bet was made. I think also that there is evidence that at the time the prosecutor handed the 5*s*. to the prisoner, the prisoner intended to keep possession of the money, whether Bird of Freedom lost or won. He therefore obtained the possession of the prosecutor's money by means of a preconcerted and premeditated fraud; in other words, by a trick. There was therefore abundant evidence of larceny, and in my opinion the conviction should be affirmed.

Conviction affirmed.

SECTION 2. BY CONSENT OTHERWISE INVALID.

REGINA *v.* ROBINS,

DEARS. C. C. 418; 6 Cox C. C. 420 [1854].

THE following case was reserved for the opinion of the Court of Criminal Appeal, by W. H. Bodkin, Esq., sitting for the Assistant Judge of the Middlesex Sessions.

John Robins was tried at the Middlesex Sessions, in September, 1854, upon an indictment which charged him with stealing five quarters of wheat, the property of his masters, George Swayne and another.

The wheat in question was not the property of the prosecutors but part of a large quantity consigned to their care and deposited at one of their storehouses. This storehouse was in the care of Thomas Eastwick, a servant of the prosecutors, who had authority to deliver the wheat only on the orders of the prosecutors, or of a person named Callow, who was their managing clerk.

It was proved that on the 24th of June the prisoner, who was a servant of the prosecutors at another storehouse, came to the storehouse in question accompanied by a man with a horse and cart, and obtained the key of the storehouse from Eastwick by representing that he, the prisoner, had been sent by the managing clerk Callow for five quarters of wheat, which he was to carry to the Brighton Railway. Eastwick, knowing the prisoner and believing his statement, allowed the wheat to be removed, the prisoner assisting to put it into the cart, in which it was conveyed from the prosecutors' premises, the prisoner going with it. It was also proved that Callow had given no such authority, the prisoner's statement being entirely false, and that the wheat was not taken to the Brighton Railway, but disposed of, with the privity of the prisoner, by other parties who had been associated with him in the commission of the offence.

The counsel for the prisoner contended that the wheat was obtained by false pretences, but the jury were directed, if they believed the facts, that the offence amounted to larceny, and they found the prisoner guilty of that offence. The prisoner was sentenced to twelve months' imprisonment and is now confined in the House of Correction at Coldbath Fields in execution of that sentence. I have to ask this Honorable Court, whether the verdict was right in point of law.

This case was argued on the 11th of November, 1854, before JERVIS, C. J., ALDERSON, B., COLERIDGE, J., MARTIN, B., and CROWDER, J.

Metcalfe, for the prisoner. In this case the prisoner obtained the wheat by means of a false pretence and was not guilty of larceny. The general rule is, that in larceny the property is not parted with and in false pretences it is. Here the prosecutor parted with the property in the wheat.

ALDERSON, B. It was delivered to the prisoner for a special purpose, namely, to be taken to the Brighton Railway.

JERVIS, C. J. He gets the key by a false pretence and commits a larceny of the wheat.

Metcalfe. Eastwick had the sole charge of the wheat; and although it was not delivered to the prisoner by the hand of the master, the delivery by Eastwick must be taken to be a delivery by the master. The decision in Regina *v.* Barnes is in favor of this proposition. There the chief clerk of the prisoner's master, on the production by the prisoner of a ticket containing a statement of a purchase which, if it had been made, would have entitled the prisoner to receive 2*s.* 3*d.*, but which purchase had not in fact been made, paid the prisoner the 2*s.* 3*d.*, and it was held that the prisoner was not indictable for larceny but for obtaining money under false pretences.

ALDERSON, B. That is simply the case of one servant being induced to give the property of the master to another servant by means of a false pretence; but here the property remained in Swaine throughout as bailee. Suppose the prisoner had been really sent by Callow and had not been guilty of any fraud, but on his way to the railway had been robbed of the wheat, could not the wheat have been laid in Swaine?

Metcalfe. Swaine was the bailee of the consignor; he had only a special property, and that special property he parted with to the prisoner.

MARTIN, B. For the purposes of this case Swaine was the owner of the wheat.

ALDERSON, B. If the prisoner had told the truth, and, having obtained the wheat without making any false pretence, had subsequently dealt with it as he has done, he would without doubt be guilty of larceny; and can it be said that he is not guilty of larceny simply because he told a falsehood? *Conviction affirmed.*

REGINA v. LITTLE,

10 Cox C. C. 559 [1867].

George Cohen Little and William Eustace were charged with stealing 276 yards of carpet, the property of the Midland Railway Company.

Three bales of carpet were entrusted to Froome, a carman in the service of the Midland Railway Company, for delivery to Easten & Co., Addle Street. From something Froome heard in Addle Street he went to 7 Philip Lane, which leads out of Addle Street. There was no name up at No. 7, but it appeared as if it had been newly done up. At No. 7 Froome saw the prisoner Little and asked him whether that was Eastens' of Addle Street. Little said, "Yes." Froome told him he had three trusses of carpet and showed him the way-bill, which indicated that three bales marked E. 959–61 were to be delivered to Easten & Co. of Addle Street. Little told him to bring them in, and they were brought in and signed for by "T. C. Little." Eustace appeared to have rented the premises on which the goods were left and became acquainted with the fact of their being in his house shortly after they were so left, and according to his own account had sold them to a man from whom he had received no money, although by his own statements to a witness he had said they had been left at this place in mistake and did not belong to him.

Sleigh, on behalf of Eustace, submitted that there was no case of larceny made out, — the Railway Company, in whom the property was laid, having parted not only with the possession but also with the property in the goods, and no trick having been shown to have been used by Eustace in order to get possession of them.

Poland contended that the Railway Company, having authority to deliver to Easten & Co., had no power to part with the property in the goods to any other parties; that the mistake of the carman in leaving them at the wrong premises did not deprive the company of their property in them; and that the subsequent conversion of them by Eustace to his own purposes was in fact a larceny of the goods of the company just as much as if he had taken them out of the cart himself.

Besley, on the same side, argued that as the goods came into the possession of Little, he by accepting possession of them might be deemed a bailee for the owner, and that directly Eustace became acquainted with the circumstances and co-operated with him he was accessary with him as bailee; and then if, contrary to that bailment, they jointly converted the goods to their own purposes, a case of

larceny would be established. He referred to Regina *v.* Robson, 9 Cox C. C. 29.

The Recorder said he should leave the case to the jury, not upon the ground that the prisoners were bailees, but that the property in the goods had not been parted with. The carman had the limited authority to part with them to Easten & Co. only, and by leaving them in mistake the property was not really parted with. *Guilty.*

REGINA *v.* LOVELL,

8 Q. B. D. 185 [1881].

CROWN CASE RESERVED.

The following case was stated for the opinion of this Court by the Chairman of the Worcestershire Quarter Sessions: —

The prisoner was tried before me at the last Worcestershire Quarter Sessions on an indictment which charged him in the first count with stealing the sum of 5*s.* 6*d.*, the property of Eliza Grigg, and in the second count with demanding with menaces from the said Eliza Grigg the sum of 5*s.* 6*d.* with intent to steal the same. The facts were these: The prisoner was a travelling grinder. He ground two pairs of scissors for the prosecutrix, for which he charged her fourpence. She then handed him six knives to grind. He ground them and demanded 5*s.* 6*d.* for the work. She refused to pay the amount on the ground that the charge was excessive. The prisoner then assumed a menacing attitude, kneeling on one knee and threatened prosecutrix, saying, "You had better pay me or it will be worse for you," and "I will make you pay." The prosecutrix was frightened and in consequence of her fears gave the prisoner the sum demanded. Evidence was given that the trade charge for grinding the six knives would be 1*s.* 3*d.*

It was contended for the prisoner that as some money was due, the question rested simply on a *quantum meruit*, and that there was no larceny or menacing demand with intent to steal.

I overruled the objection and directed the jury on the authority of Regina *v.* M'Grath[1] that if the money was obtained by frightening the owner, the prisoner was guilty of larceny.

The jury found that the money was obtained from the prosecutrix by menaces and that the prisoner was guilty.

[1] Law Rep. 1 C. C. R. 205.

I reserved for the consideration of this Court the question whether upon the facts stated he was properly convicted.

PER CURIAM. The conviction in this case was right. Regina *v.* M'Grath is conclusive of the matter.

REGINA *v.* WEBB,

5 Cox C. C. 154 [1850].

THE prisoner was indicted for stealing a pair of boots.

It appeared in evidence that the prisoner having given the prosecutor an order for the boots, they were sent by a servant with directions not to part with them until he had received payment. On his way he met the prisoner, who said the boots were for him, and having given the servant two counterfeit half-crowns in payment, he took the boots away.

The prisoner had been also arraigned on a charge of uttering the two half-crowns, knowing them to be counterfeit, and to that charge he had pleaded guilty.

Robinson, for the prisoner, contended that upon this evidence the charge of larceny was not made out. The indictment should have been for obtaining money [goods?] under false pretences. The possession of the servant was that of the master, and when he gave up the goods it was the same as if the master had done so. Then he had been already indicted and had pleaded guilty to the fact on which the present charge was based. *Autre fois convict* could not of course be pleaded, because the indictment was not specifically the same; but the transaction was a single one, and but one act of fraud was perpetrated. The maxim that no man ought to be twice vexed for the same offence would apply; and if there was no other mode of carrying out the principle, the jury should be directed to return a verdict of not guilty.

Cooper, for the prosecution, submitted that the prisoner was now on his trial for a totally different offence from that to which he had pleaded guilty. Not only were the offences different, but the acts charged were several and distinct in fact. The counterfeit coin was uttered and after that the goods were obtained. The obtaining goods was no element in the former charge.

Secondly, this was a larceny and not the obtaining goods under false pretences. The distinction rested upon the fact that the servant received orders from his master not to part with the goods until he had received payment. Regina *v.* Small, 8 C. & P. 46, was very similar to this case, and there that principle was laid down; Regina *v.* Stewart, 1 Cox C. C. 174, was also in point.

Robinson, in reply, quoted Regina *v.* Parkes, 2 East, P. C. 671; 2 Leach, 614; there, there was a trick resorted to for the purpose of securing the delivery of goods to the prisoner and there was a pretended payment to the servant; but the judges were of opinion that the goods having been parted with upon receipt of what was accepted as payment by the servant, the charge of larceny could not be sustained. As to the charges being different, the uttering counterfeit coin would be no offence, unless it were done for a fraudulent purpose; that purpose here was the obtaining the goods, which was therefore the one main ingredient in both charges.

THE RECORDER. In Regina *v.* Parkes, there appears to have been no direction to the servant not to part with the goods without the money; but Regina *v.* Small seems to be expressly in point, and I shall direct the jury as they were directed there, that if they think this was a preconcerted scheme fraudulently to get possession of the boots and that the servant had but the limited authority which the master swears he gave him, then the prisoner may be convicted of the larceny. I cannot see how the previous judgment against the prisoner for uttering counterfeit coin can affect this case. The offences are distinct, and if he has committed both, there is nothing to prevent his being convicted of both. *Verdict, guilty.*

SECTION 3. BY ACQUIESCENCE FOR DETECTION.

REX *v.* EGGINGTON,

2 EAST P. C. 494, 666; 2 B. & P. 508.

[Indictment for larceny.]

. . . . . .

IT . . . appeared that the prisoners had some time previous to the breaking into the . . . building applied to one Joseph Phillips, who was employed as a watchman to the manufactory at Soho, to assist them in robbing it, to which he assented, and informed first some of Mathew Boulton's servants and assistants, and afterwards Mathew Boulton himself of what was intended, of the manner and time they were to come, that they were to go into the counting-house, and that he was to open the door into the front yard to the prisoners; that Mathew Boulton told him to carry on the business; that Mathew Boulton was to bear him harmless; and that Mathew Boulton consented to his opening the door leading to the front yard, and to his being with the

prisoners the whole time; that in consequence of this information Mathew Boulton removed from the counting-house everything but 150 guineas and some silver ingots, which he marked to furnish evidence against the prisoners, and lay in wait to take them when they should have accomplished their purpose; that on the 23d of December, about one o'clock in the morning, the prisoners came, and Phillips opened the door into the front yard, through which they went along the front of the building and round it into another yard behind it called the middle yard; and from thence they and Phillips went through a door, which was left open, up a staircase in the centre building leading to the counting-house and rooms where the plate-business was carried on; that this door the prisoners bolted, and then broke open the counting-house, which was locked, and the desks, which were also locked, and took from thence the ingots of silver and guineas; that they then went to the story above into a room where the plate-business was carried on, and broke the door open, and took from thence a quantity of silver and returned downstairs, when William Foulds unbolted the door at the bottom of the stairs, which had been bolted on their going in, and went into the middle yard, when all except William Foulds (who escaped) were taken by the persons placed to watch them.

On this case two points were made for the prisoners; first, that no felony was proved as the whole was done with the knowledge and consent of Mathew Boulton, and that the acts of Phillips were his acts.

. . . . . .

The jury found the prisoners guilty; but LAWRENCE, J., reserved the above points for the consideration of the judges, before eleven of whom (*absente* LORD ELDON, then Lord Chancellor as well as Lord Chief Justice of the Common Pleas) it was argued on the 9th of May last.

Clifford, for the prisoners. . . . With respect to the first objection, the consent of the prosecutor removes all criminality from the prisoners. In almost every species of offence committed against the property of another, it is of the essence of the offence that it should be committed against the will of the owner. Bracton, lib. 3, tr. 2, c. 32, fo. 150 *b*, defines theft thus, *contractatio rei alienæ fraudulenta cum animo furandi invito illo Domino cujus res illa fuerit;* and Lord C. J. Willes in The King *v.* Donally, 1 Leach, 232, ed. 1800, seems to take it for granted that robbery must be against the will of the owner when he says, "Wherever one man obtains property from the possession of another against his will, the law presumes the act to proceed from a felonious intention." The prosecutor's assent to the commission of the crime would undoubtedly

have made him an accessary before the fact, had it not been an assent to the stealing of his own property. In the King *v.* M'Daniel, Fost. 125, it is laid down as incontrovertible, "that whoever procureth a felony to be done is a felon; if present, he is a principal; if absent an accessary before the fact;" and the statutes 4 & 5 Ph. & M. c. 4, and 3 and 4 W. & M. c. 9, are referred to; which, in describing the offence, speak of persons who "maliciously counsel, hire, command, comfort, aid, abet, or assist." Sir Edward Coke, in his commentary on the statute of West. 1, c. 14, 2 Inst. 182, says, that under the word "aid" is comprehended all persons "assenting and consenting" to the act. Now in this case the prosecutor did assent and consent, and if his crime be done away by the circumstance of the property, to the stealing of which he assented, being his own, the same circumstance does away the crime of the prisoners also; for if this was a felony, the prosecutor is criminal as an accessary, and he can only show himself not criminal as such by showing that the prisoners committed no felony. Suppose Phillips the watchman had been indicted for the burglary, what could have prevented his being convicted of the crime but the assent of the prosecutor? Now that assent extends to all the persons concerned and will operate to save the prisoners in the same way as it would have operated in his favor. To show that without such assent Phillips must have been convicted, Joshua Cornwell's Case, 10 Harg. St. Tr. 433, in the notes, may be referred to, where the opening the door of his master's house by the prisoner in the night-time and letting in two persons to rob him, was adjudged by the twelve judges to be burglary. In The King *v.* M'Daniel, all the prisoners were acquitted on account of the robbery having been committed in consequence of a previous agreement, and it is there said to be "of the essence of robbery and larceny that the goods be taken against the will of the owner." The only case in which the assent of the party robbed has been held not to take away the felony is that of Norden, cited in the judgment of The King *v.* M'Daniel, Fost. 129, but the answer to that case is there given, namely, that it was uncertain whether the robber would come or not, the officer having no concert with the highwayman but only going upon the road in expectation of being robbed and submitting to the robbery. In this case there was a regular plan for the robbery of the prosecutor's premises carried on through the intervention of the accomplice with the prosecutor himself.

Manley, on the part of the prosecution. . . . It has been argued that if the offence of the prisoners amount to a felony, the prosecutor has made himself an accessary to that felony by his conduct, and that if he be not an accessary it must be because no felony was committed. But the essence of the felony consists in the fel-

onious intent. Thus Bracton in the place cited on the other side, after saying that theft must be committed *cum animo furandi*, adds, "cum animo dico, quia sine animo furandi non committitur." The prosecutor therefore was not *particeps criminis*, inasmuch as his consent was only given for the purpose of promoting the detection of the prisoners. The present resembles Norden's case, who went out with a view to be robbed in order that he might apprehend the robber. But in neither case was there any concert between the party committing the offence and the party on whom it was committed. Such also was the case of the man tried some little time back at Worcester Assizes, who being suspected of robbing in an inn there, a great-coat was placed in his way with a pocket handkerchief hanging out of the pocket, and the man being watched and detected in stealing the handkerchief, was convicted before Mr. Baron Thompson, who overruled the objection that he was induced to commit the offence by the persons who placed the great-coat in his way. There is also a case in Fitzherbert's Justice of the Peace, by Crompton, Ed. 1617, p. 31, *b*, which is precisely in point. There the servant of an alderman of London agreed with strangers to steal the plate of his master on a certain night in his house, and they had a false key of the place where the plate was kept; afterwards the servant revealed the design to his master, who on the appointed night had certain men ready at the place, *et apres ils vient et enter in le dit lieu*, with intent to steal the plate, and were taken and arraigned for burglary at Newgate, found guilty, and hanged.

. . . . . .

The objection was overruled.

REGINA *v.* WILLIAMS,

1 C. & K. 195 [1843].

THE prisoner was indicted for stealing, on the 9th of January, four shillings of the moneys of William Michael Davis.

The prosecutor Davis was a publican keeping the Blue Posts in Berwick Street. A witness named Lincoln was called for the prosecution, and said: I am in the service of Mr. Davis. I had been there seven months. I had been there when a man named Ashton was barman. He went away in October. I had seen the prisoner there during the time Ashton was there. I met him going up Broad Street nearly three months before he was taken into custody, at the latter end of October. He asked me if I wanted any money "worked" for me. I said, "No;

I did not want any." He said, "It would be a great deal to my interest if I worked any." I said, "No; I never worked any, and did not wish to have any worked for me." That was what I said to him at that time, and we parted. I had heard "worked money" spoken of by my master, and had read about it in the newspaper. I communicated to my master what had passed between me and the prisoner. About six weeks after my first conversation, the prisoner came to my master's house (my master was in the bar at the time); he did not say anything then. On the 5th of January my master gave me directions in consequence of which I went to Lambeth Square, New Cut, where I thought I could find the prisoner. He was not in the way, and I wrote this note by my master's direction and left it for him: "Mr. Williams will greatly oblige me by calling on me at Mr. Davis', Blue Posts, Berwick Street, as I have got a little business for you to do for me upon what you spoke to me about a little while ago." I left it about five in the evening. About half-past seven he and his wife came to my master's house. I saw them outside the door. The prisoner came and patted me on the shoulder. I said I did not expect to see him down so soon. He said directly he got the note he came down. I asked if he could come on Saturday evening. He said perhaps I could give him something that evening. I said he could come in if he liked. He came in, and bought some liquor with a sixpence. I gave him the proper change. He came a second time the same evening. I drew him a glass of liquor. He put down a shilling and said, "On to it now!" I did not give him any more money than he was entitled to then. On the following Sunday I saw him in the street, and walked with him along Compton Street and down Covent Garden Market into the Strand. I went to the Red Lion there, and had a conversation with him about Ashton. An arrangement was made between me and him, that he was to come down that evening and come in once or twice in the evening, and I was to give him what I could each time. He said he was to put down a shilling; I was to take it up, make a pretence of putting it into the till, take out two or three more and place it on the counter, and he was to take it up; and if he was to come in again I was to rub my arm, if not I was to put out my finger. I told my master all that had passed. The prisoner came in twice during that evening. On the Monday he was to come again. I saw some money marked and put into the till. He came between seven and eight in the evening. An officer was sent for. The officer had arrived when the prisoner first came in that evening. I did not give him any money the first time. He came in again, and bought a pennyworth of gin. He put down a shilling. I then gave him four marked shillings, the shilling he gave me, and threepence halfpenny. Directly my hand was off

it he took it off the counter and put it into his right-hand pocket, and was going to walk off with it, when he was seized by the officer.

The evidence of Mr. Davis was as follows: I am Lincoln's master. In consequence of information from him, I marked ten shillings on Monday the 9th of January, and put them into the till. Some of them were afterwards produced to me by Beresford the officer. Lincoln had previously made communications to me on the prisoner's propositions to him. He acted in this with my knowledge and consent, and by my directions. I gave him directions to give the prisoner the money in the way he has done. I do not recollect that I told him to write the letter, but I told him to call upon the prisoner and renew the connection.

Prendergast, for the prisoner, contended that under the circumstances detailed in the evidence the offence of larceny had not been committed by the prisoner.

Payne and *Bodkin*, for the prosecution, argued that it was just as much a trespass and a felonious taking in the prisoner, as if the money had not been delivered to him by the servant by previous arrangement, and with the consent of the master.

MIREHOUSE, C. S., entertained doubt upon the subject but left the facts to the jury, who found the prisoner

Guilty.

Judgment was respited that the opinion of the judges might be taken upon the question.

The conviction was afterwards held right, and the prisoner received sentence of imprisonment for one year.

CHAPTER XXVII.

LARCENY.

PRESUMED CONSENT. — LOST GOODS.

REGINA *v.* REEVES,

5 JUR. N. S. 716 [1859].

THE prosecutor deposed that, being somewhat tipsy he lay on the ground partly asleep, and while in that state saw the prisoner take his watch out of his pocket, which he took no steps to prevent, believing

that the prisoner, with whom he had been acquainted for some time, was acting solely from friendly motives. Some days after he claimed his watch from the prisoner, who denied having had it; but other witnesses deposed that he had in the meantime offered it for sale.

F. Robinson, for the prisoner, objected that there was no trespass and consequently no larceny.

CROWDER, J. This evidence would not support a charge of larceny at common law, but the recent statute 20 & 21 Vict. c. 54, § 4, enacts that "if any person being a bailee of any property shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment he shall be guilty of larceny." Here the evidence discloses a bailment sufficient to bring the case within that statute, *i. e.*, if the jury are satisfied on the facts.

Verdict, not guilty.

REGINA *v.* THURBORN,

1 DEN. C. C. 387 [1848].

CROWN CASE RESERVED.[1]

THE prisoner was tried before Parke, B., at the summer Assizes for Huntingdon, 1848, for stealing a bank note.

He found the note, which had been accidentally dropped on the high road. There was no name or mark on it indicating who was the owner; nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; he then changed it and appropriated the money taken to his own use. The jury found that he had reason to believe and did believe it to be the prosecutor's property before he thus changed the note.

The learned baron directed a verdict of guilty, intimating that he should reserve the case for further consideration. Upon conferring with Maule, J., the learned baron was of opinion that the original

[1] This case is reported elsewhere, by mistake, as R. *v.* William Wood.

taking was not felonious, and that in the subsequent disposal of it there was no *taking*, and he therefore declined to pass sentence, and ordered the prisoner to be discharged on entering into his own recognizance to appear when called upon.

On the 30th of April, A. D. 1849, the following judgment was read by PARKE, B.

. . . . . .

The rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise; but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination.

It would probably be presumed that the taker would examine the chattel as an honest man ought to do at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel.

To apply these rules to the present case: the first taking did not amount to larceny, because the note was really lost and there was no mark on it or other circumstance to indicate then who was the owner or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it, *animo furandi*, and the point to be decided is whether that was a felony.

Upon this question we have felt considerable doubt.

If he had taken the chattel innocently and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner;

for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense and the question is, does that make a difference? We think not; it was dispunishable as we have already decided, and though the possession was accompanied by a dishonest intent it was still a lawful possession and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than the others, and consequently no larceny.

We therefore think that the conviction was wrong.[1]

REGINA *v.* PIERCE,

6 Cox C. C. 117 [1852].

James Pierce and Richard Pugh were indicted for stealing, on the 9th of May, 1852, a dressing-case and other articles, the property of the Shrewsbury and Birmingham Railway Company. . . . In other counts the articles were laid as the property of Henry Cunliffe.

. . . . . .

At the trial the following facts were proved on the part of the prosecution: The Rev. Henry Cunliffe, on the 9th of May, was a first-class passenger from Shrewsbury to the Shiffnal station on the railway. On reaching home he missed a dressing-case which formed part of his luggage, and was in the carriage with him. Having reported his loss to the railway authorities, inquiries were instituted, and the dressing-case and some of its contents were found in the house of the prisoner Pierce, at Shrewsbury, who was an engineer in the employment of the railway company, and who conducted the train by which Mr. Cunliffe had travelled. Richard Pugh was a stoker in the employment of the company, and he accompanied the train in question with Pierce. The evidence against him consisted in a statement which he made to the police constable, to the effect that he found the dressing-case in a first-class carriage on the arrival of the train at Codsall, one of the stations on the line; and that he carried it to the engine, and gave it to Pierce, who opened it with a wrench, and, on their return to Shrewsbury, gave him some of the articles out of it as his share. A portion of the contents of the dressing-case was found at Shrewsbury, in the house of John Pugh, Richard Pugh's father. Jane Pugh, the mother, was proved to have pawned a gold ring which also formed a part of the contents of the dressing-case.

[1] [See to the same effect Regina *v.* Glyde, L. R. 1 C. C. R. 138; 11 Cox C. C. 103 (1868).]

The part of the line of railway along which Mr. Cunliffe travelled is in the county of Salop; but the Codsall station, to which the train proceeded after Mr. Cunliffe left it, and where, according to Pugh's statement, the dressing-case was taken from the carriage, is in Staffordshire.

. . . . . .

It was urged [for the defence] that, if the prisoners found the dressing-case, without any owner for it, and took it away to take care of it, it was not larceny.

Williams, J., in summing up, said there was no pretence for treating this as a case of lost property. It was the duty of the prisoners, if they found such an article left by a passenger, to take it to the station-house or some office of the line. It was absurd to say that this case was analogous to that of the finder of lost property. It was nothing like lost property. With respect to the point raised as to the venue, if the jury thought the evidence of a stealing from the carriage in the course of the journey was not satisfactory, then they must acquit the prisoners Pierce and Pugh of the charge of stealing, and consider what evidence there was against them and the other prisoners of receiving the goods knowing them to have been stolen.

The jury convicted Pierce and Richard Pugh.

CHAPTER XXVIII.

Larceny.

Character, Extent, and Object of the Possession Assumed. — The Question of *Lucri Causa*.

REGINA *v.* BEECHAM,

5 Cox C. C. 181 [1851].

The indictment in the first count charged the prisoner with the larceny, on the 8th of February, 1851, of three railway tickets of the value of six pounds three shillings, and three pieces of pasteboard of the value of one penny, the property of the London and North Western Railway Company.

In a second count the tickets were described as the property of the station-master at the Banbury Road station.

It appeared in evidence that the prisoner was employed by the railway company as a porter in the goods department of the Banbury Road station. On the evening of the 8th of February he was drinking beer at the station with a witness of the name of Hazell, who was a horsekeeper employed at the station by an innkeeper. The station-clerk having about half-past eight o'clock in the afternoon left his office to work the electric telegraph in another compartment of the station, the prisoner went into the ticket office, took out three first-class tickets for the journey from Banbury Road station to York, and stamped them in the machine for the "8th February." The last train for York for that day had been despatched a considerable time and the prisoner tried to alter the stamping machine so as to re-stamp the tickets with another date but failed in the attempt. He then gave one of the tickets to Hazell, saying, "There, you fool, when you want to go a long journey you need not pay; come here and do this."

Hazell mentioned the circumstance on the following day to the station-clerk, who went to the prisoner and taxed him with the offence, saying, "You have railway tickets in your pocket." The prisoner at first denied it, then said if he had them he did not know it, and eventually took the two tickets from his pocket. He immediately afterwards went to the station-master and told all the matter to him; the latter said the prisoner should pay for the tickets or be reported. A few days afterwards he was suspended from his employment and given into custody on this charge. It appeared in evidence that tickets stamped for one day might be re-stamped for another day and so become available.

At the close of the case for the prosecution,

Williams, for the prisoner, submitted that the 2d count of the indictment could not be sustained. The station-master had no property in the tickets, as he was the servant of the railway company, and merely had the custody of the tickets.

PATTESON, J., expressed his assent to that proposition.

Williams then objected with respect to the first count, that as the prisoner must have intended, supposing he took the tickets with a view to their use, that they should be returned to the company at the end of the journey, there was no such absolute taking away without an intention of restoration as was necessary to constitute a felony.

PATTESON, J., said his opinion was that it was a question for the jury to say whether the prisoner took the tickets with an intention to convert them to his own use and defraud the company of them.

. . . . . .

The learned judge in summing up told the jury that if the prisoner took the tickets with intent to use them for his own purposes, whether

to give to friends or to sell them or to travel by means of them, it would not be the less larceny though they were to be ultimately returned to the company at the end of the journey.

Verdict, not guilty.

REGINA *v.* PHETHEON,

9 C. & P. 552 [1840].

THE prisoner was indicted for stealing on the 26th of February, 1840, four salt cellars and other articles of silver plate of the value altogether of £18 5*s.*, the goods of Thomas Robert, Baron Hay, his master, in his dwelling-house.

It appeared that the prisoner was under butler to Lord Hay and while he was in the service pledged the articles mentioned in the indictment.

The jury found the prisoner guilty; but recommended him to mercy on the ground that they believed he intended to replace the property.

C. C. Jones, for the prisoner, submitted that this finding amounted in law to a verdict of not guilty.

GURNEY, B., without expressing any opinion upon the point, directed that the prisoner should be tried upon another indictment which had been preferred against him.

The prisoner was accordingly charged with stealing, on the 6th of November, 1839, one silver saucepan of the value of £2 10*s.*, the goods of the same prosecutor.

It appeared from the testimony of a servant of Lord Hay, who was more generally known by his Scotch title of Earl of Kinnoul, that the saucepan mentioned in the indictment was last seen by him upwards of two years previous at Duplin Castle, in Perthshire, where it was in use in Lady Kinnoul's apartment.

A witness proved that on the 16th of July, 1840, the prisoner called upon him and left a parcel with him, which on being opened was found to contain ten pawnbroker's duplicates, from one of which it appeared that the silver saucepan was pledged at the shop of a pawnbroker named Mills, in the Edgeware Road, for £2 10*s.*, by a young woman.

The prisoner was in the service of Lord Kinnoul at Duplin Castle at the time the saucepan was in use there, and followed the family to England in the month of April, 1838; and a witness stated that in the natural course of things the saucepan would come to England with the other property.

C. C. Jones, in his address to the jury for the prisoner, asked them

to consider whether the prisoner took the article in question feloniously, or whether he took it intending at the time he sent it to the pawnbroker's to redeem it as soon as he could. He argued that the fact of the prisoner having kept the duplicate was a strong circumstance to show that he intended to redeem the property.

GURNEY, B., in his summing up after stating the facts observed: You will say whether the prisoner stole this property or not. I confess I think that if this doctrine of an intention to redeem property is to prevail courts of justice will be of very little use. A more glorious doctrine for thieves it would be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined.

The jury found the prisoner guilty and he was sentenced to be transported for fourteen years.[1]

REGINA *v.* MEDLAND,

5 Cox C. C. 292 [1851].

THE prisoner was indicted for larceny. It appeared that she had taken ready-furnished lodgings, and had pawned some of the property therein belonging to the landlord. It was proved that she had often pawned and afterwards redeemed portions of the same property.

Robinson, for the prisoner, submitted that if the jury were satisfied

[1] In Carrington's Supplement to the Criminal Law, p. 278, 3d edition, the following case is reported: On an indictment for larceny by a servant in stealing his master's plate, it appeared that after the plate in question was missed, but before complaint made to the magistrate, the prisoner replaced it; and it was proved by a pawnbroker that the plate had been pawned by the prisoner who had redeemed it; and the pawnbroker also stated that the prisoner had on previous occasions pawned plate and afterwards redeemed it. Hullock, B., (Holroyd, J., being present) left it to the jury to say whether the prisoner took the plate with intent to steal it or whether he merely took it to raise money on it for a time and then return it; for that in the latter case it was no larceny. The jury acquitted the prisoner. R. *v.* Wright, O. B., 1828, MS.

This decision has given rise to much discussion in various cases, and much difficulty has been found in applying the doctrine it lays down to the facts of particular transactions. In some instances where it has appeared clearly that the party only intended to raise money on the property for a temporary purpose, and at the time of pledging the article had a reasonable and fair expectation of being able shortly, by the receipt of money, to take it out of pawn, juries under the advice of the judge have acted upon the doctrine and acquitted. But in other instances where they could not discover any reasonable prospect which the party had at the time of pledging of being able soon to redeem the article, they have considered the doctrine as inapplicable and have convicted. [Reporter's Note.]

that the prisoner took the property for the purpose of pawning, but with the intention of redeeming it, she would be entitled to an acquittal because the intent would not be permanently to deprive the owner of it. R. *v.* Phetheon, 9 C. & P. 552; and R. *v.* Wright, 9 C. & P. 559, were referred to.

The RECORDER after consulting the judges in the adjoining court: I have taken the opinion of Mr. Justice Coleridge and of Mr. Baron Platt upon this case, and they both think with me that there is nothing in the evidence that will justify the jury in acquitting the prisoner on the ground that she took this property with the intention of redeeming it. It would be very dangerous to hold that the suggestion of such an intent would be sufficient to constitute a valid defence. A person may pawn property without the slightest prospect of ever being able to redeem it, and yet there may be some vague intention of doing so if afterwards the opportunity should occur, however improbable it may be that it will do so. But it can never be said that there is an intention to redeem under circumstances that render it very improbable or at least uncertain that such ability will ever exist. A man may take my property, may exercise absolute dominion over it, may trade upon it and make a profit upon it for three months, and yet may say, when charged with stealing it, that he meant to return it to me at some time or another. I shall direct the jury that for such a defence to be at all available there must be not only the intent to redeem evidenced, by similar previous conduct, but there must be proof also of the power to do so, of which the evidence here seems rather of a negative character.

Verdict, Guilty.

REGINA *v.* TREBILCOCK,

7 Cox C. C. 408 [1858].

AT the General Quarter Sessions of the Peace holden in and for the borough of Plymouth, on the 1st day of January, 1858, before Charles Saunders, Esq., Recorder, the prisoner, William Trebilcock, was tried on an indictment which charged him, first, with a larceny upon the Stat. 20 & 21 Vict. c. 54, § 4,[1] in having as bailee of plate, the property of the prosecutor, fraudulently converted it to his own use; secondly,

[1] The section is as follows: "If any person being a bailee of any property shall fraudulently take or convert it to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny."

with a common larceny of the same plate. The jury found the prisoner guilty on both counts of the indictment, but recommended him to mercy, believing that he intended ultimately to return the property. The question for the opinion of the Court is whether, consistently with the ground upon which the jury recommended the prisoner to mercy, the conviction was right upon both or either of the counts.

The case was this: The prosecutrix, Miss Palmer, resided at Plymouth, and going to London for eight or ten days, deposited with the prisoner, a tradesman at Plymouth, who had offered to take care of anything for her during her absence, a chest of valuable plate for safe custody till she returned. The prisoner had been told that the prosecutrix would leave a parcel with him, which he said that he would put in his iron chest to keep for her. When the chest of plate was placed in the prisoner's hands it was locked (the prosecutrix keeping the key), then covered with a wrapper sewed together, and sealed in a great number of places, and then tied with cord. The prisoner was not informed of the contents of this parcel, nor was any key given to him. In a day or two after the prosecutrix left for London, he had uncorded the chest, broken the seals, taken off the wrapper, procured a key, opened the chest, and taken out a part of the plate, and offered it to one Woolf, at Plymouth, as a security for the advance of £50. The pawnbroker took up one of the pieces of plate which bore the crest and also a superscription with the name of Sir George Magrath upon it, and expressing his dislike to have anything to do with it, the prisoner said that he was under an engagement to be married to Lady Magrath. The prosecutrix had lived with Sir George Magrath, and when he died the plate, among other property, came into her possession. Woolf ultimately declined any advance upon it. The prisoner then communicated by letter with another pawnbroker named Druiff, at Newport in Monmouthshire, with whom the prisoner had before had bill transactions. Druiff came to the prisoner at Plymouth and advanced him £200, taking bills for the amount, and the whole chest of plate worth from £500 to £600, as a collateral security for the loan. Druiff took the plate away with him to Newport. The prisoner, by way of accounting to Druiff for the possession of the plate, represented to him that he was going to get married to the lady of the late Sir George Magrath, and that she had given him the plate to take care of till they were married. The prosecutrix went to London on the 8th day of November, and returned on the 17th of the same month. On her return the prosecutrix tried often to see the prisoner but could not do so till the 26th. When she first saw him and asked him for the parcel, the prisoner said he would send it to her the same evening. It was not sent. The prosecutrix went often backwards and forwards to the prisoner's shop and private resi-

dence to see the prisoner, but could not see him again till the 2d of December, when the prosecutrix insisted upon instantly having her parcel. The prisoner said she could not have it as it was out of town, he had sent it to Bristol; then he said it was now farther than Bristol, that it was in Wales, but that he would write a letter and she should have it on Friday. The parcel did not arrive. The prisoner refused to tell in whose hands it was, but the prosecutrix had learned from the prisoner's father that Druiff had it. The inspector of police went to Newport and found the chest of plate there, but Druiff refused to give it up unless upon payment of the £200 for which it had been deposited with him as security. The prisoner could not redeem it, and upon the facts being made known to the prosecutrix she had the prisoner taken into custody on a charge of stealing, and the police took possession of the chest of plate as stolen property.

Upon the finding of the jury, with the recommendation to mercy above stated, the counsel for the prisoner contended that to support either of the counts in the indictment, it was necessary that the prisoner should have intended permanently to deprive the prosecutrix of her property, and that, as the jury believed that his intention was ultimately to return it, the verdict was wrong.

The prisoner was committed to prison, and sentence deferred until the opinion of the judges shall have been obtained upon the question raised. If the Court shall be of opinion that the ground upon which the jury recommended the prisoner to mercy may consist with the verdict upon both or either of the counts of the indictment, the verdict to stand upon both or either of the counts accordingly. If the recommendation may not consist with the verdict on either count, then the verdict to be set aside, and a verdict of not guilty to be recorded.

E. W. Cox, for the prisoner. The question is whether the recent statute, 20 & 21 Vict. c. 54, § 4, alters the general law of larceny in any other respect than making a bailee liable.

Lord Campbell, C. J. If this was larceny at all, it was larceny at common law. The statute would make no difference in this respect.

Coleridge, J. If not a larceny at common law the new statute would not make it such; so that the only question is whether the prisoner could properly be convicted of larceny at common law. The jury have found him guilty.

E. W. Cox. Yes; but they recommended him to mercy on a ground which shows that a verdict of guilty is wrong. They found that he intended ultimately to return the property to the owner.

Crowder, J. That is, if he could get it back again.

E. W. Cox. The law on this subject is distinctly laid down in R. *v.* Holloway, 3 Cox C. C. 145; and still more recently in R. *v.* Poole

and Yeates, 7 Cox C. C. 373. In R. *v.* Holloway, Parke, B., said, that in order to constitute larceny there must be the intention to deprive the owner wholly of his property, to usurp the entire dominion over the chattels taken, and to make them his own; and Lord Denman used similar language, putting the case of a man taking a horse, with the intention of riding him throughout England, and then returning him.

COLERIDGE, J. But in this case the jury do not say that at the time of the taking the prisoner intended to return the plate.

LORD CAMPBELL, C. J. On the contrary they negative it by finding him guilty.

E. W. Cox. It is necessarily implied in their statement, that when he parted with it to the pledgee, he had it in his mind to get it back again and restore it to the owner.

LORD CAMPBELL, C. J. Your general proposition of law is right enough, but it does not apply to this case.

E. W. Cox. If the Court interprets the expression used by the jury, as meaning only that at some time after the larceny the prisoner intended to return the property, the argument founded on R. *v.* Holloway necessarily fails. But that could not be the meaning of their finding. The alleged larceny was complete at the moment of depositing the plate with the pledgee. It was for that he was tried, and to that alone was the attention of the jury directed. They had nothing to do with any subsequent intent. Their conclusion could have had reference only to the felonious act charged in the indictment, and to the moment of committing it, and if they were of opinion that he had then an intention to return it, of which there is no doubt, he is not guilty of larceny.

LORD CAMPBELL, C. J. The general proposition contended for by Mr. Cox is perfectly correct. To constitute larceny, there must be an intention on the part of the thief completely to appropriate the property to his own use; and if at the time of the asportation his intention is to make a mere temporary use of the chattels taken, so that the *dominus* should again have the use of them afterwards, that is a trespass, but not a felony; but that law does not apply to this case. Here there was abundant evidence of a larceny at common law; abundant evidence from which the jury might find that the prisoner feloniously stole the plate; and the jury have found a verdict of guilty. But they have recommended him to mercy, and accompanied that recommendation with a statement as to the prisoner's intention to return the stolen property. Now, I doubt whether what the jury say in giving their reason for recommending the prisoner to mercy, is to be considered as part of their finding; but even assuming it to be so, all that they say is, that he intended ultimately to return the property; not that at the time of

the wrongful taking he originally intended to make a merely temporary use of it.

COLERIDGE, J. I am of the same opinion. There is no question about the law in this case; but the question is merely as to the facts. And upon the facts it appears that the prisoner had put it out of his power to return the plate which he had taken. Then what must we do in order to make sense of the finding of the jury? It is to be observed, that the recommendation to mercy in itself assumes that the verdict of guilty is correct; but the jury seem to have thought that the prisoner had it in his mind at some uncertain time, if he could get hold of it again, to restore the property, and they might consider that a sufficient reason for recommending him to mercy. That interpretation makes sense of their finding, while the construction put upon it by Mr. Cox renders their conduct quite inconsistent and insensible.

MARTIN, B. I am of opinion that the recommendation to mercy, and the words which accompanied it, were no part of the verdict at all and that when the jury said guilty, there was an end of the matter, so far as the verdict was concerned. But I also think that even if it did form part of the verdict, it would not have the effect of bringing it within the principle of the cases on which Mr. Cox relies. It seems to me quite clear that this prisoner stole the plate, and then pledged it for £200, and I think that in so doing he "usurped the entire dominion of it" within the meaning of that expression as used by Parke, B., in the case cited. If, therefore, a special verdict had been found in the very terms used by the jury, when they recommended the prisoner to mercy, I should have said that he was still guilty of larceny.

CROWDER, J. It seems to me, also, that upon the facts of this case no other rational conclusion could be arrived at, except that the prisoner stole the plate. He broke open the box, and took out the plate and stole it, but the jury recommended him to mercy because they thought that he had an intention of ultimately restoring it. Probably it very often happens that when stolen goods are pawned, there is an intention to get them back again, if the person pawning them should ever be able to do so, and in that case to return them; but such an intention affords no ground for setting aside a verdict of guilty, when the offence of larceny is satisfactorily proved by the evidence.

WATSON, B. I also think that this is the clearest case of larceny possible, though the jury have recommended the prisoner to mercy, because they thought that he would ultimately have restored the property if he could have got it back.

Conviction affirmed.

REX *v.* CABBAGE,

Russ. and Ry. C. C. 292 [1815].

The prisoner was tried before Thomson, C. B., at the Lent Assizes for the County of Lancaster in the year 1815, on an indictment for feloniously stealing, taking, and leading away a gelding, the property of John Camplin.

The second count charged the prisoner with feloniously, unlawfully, wilfully, and maliciously killing and destroying a gelding, the property of the said John Camplin, against the statute, etc.

The counsel for the prosecution elected to proceed upon the first count.

It appeared that the gelding in question was missed by the prosecutor from his stables on Monday, the 28th of February, 1815. The stable-door, it appeared, had been forced open. The prosecutor went the same day to a coal-pit, about a mile from the stable, where he saw the marks of a horse's feet. This pit had been worked out and had a fence round it, to prevent persons from falling in; one of the rails of this fence had been recently knocked off. A man was sent down into the pit, and he brought up a halter, which was proved to be the halter belonging to the gelding. In about three weeks after the finding of the halter, the gelding was drawn up from the coal-pit in the presence of the prosecutor, who knew it to be his. The horse's forehead was very much bruised, and a bone stuck out of it. It appeared that at the time this gelding was destroyed, a person of the name of Howarth was in custody for having stolen it in August, 1813, and that the prosecutor, Camplin, had recovered his gelding again about five weeks after it was taken. Howarth was about to take his trial for this offence when the gelding was destroyed in the manner stated. The prisoner Cabbage was taken into custody on the 27th of March, 1815; and on his apprehension he said that he went in company with Anne Howarth (the wife of Howarth who was tried for stealing the said gelding) to Camplin's stable-door, and that they together forced open the door and brought the horse out. They then went along the road till they came to the coal-pit before mentioned, and there they backed the horse into the pit.

It was objected by the prisoner's counsel, that the evidence in this case did not prove a larceny committed of the horse; that the taking appeared not to have been done with intention to convert it to the use of the taker, "animo furandi et lucri causa."

THOMSON, C. B., overruled the objection, and the prisoner was convicted upon the first count of the indictment, for stealing the horse. Judgment was passed on him, but the learned Chief Baron respited the execution to take the opinion of the judges as to the propriety of the conviction.

In Easter term, 1815, the judges met to consider this case, and the majority of the judges held the conviction right. Six of the learned judges, namely, RICHARDS, B., BAYLEY, J., CHAMBRE, J., THOMSON, C. B., GIBBS, C. J., and LORD ELLENBOROUGH, held it not essential to constitute the offence of larceny that the taking should be *lucri causa;* they thought a taking fraudulently with an intent wholly to deprive the owner of the property sufficient; but some of the six learned judges thought that in this case the object of protecting Howarth by the destruction of this animal might be deemed a benefit or *lucri causa.* DALLAS, J., WOOD, B., GRAHAM, B., LE BLANC, J., and HEATH, J., thought the conviction wrong.

REX *v.* MORFIT,

RUSS. AND RY. C. C. 307 [1816].

THE prisoners were tried before Mr. Justice Abbott, at the Maidstone Lent Assizes, in the year 1816, upon an indictment for feloniously stealing two bushels of beans, value five shillings, the goods of John Wimble.

On the trial it was proved that the prisoners were servants in husbandry to Mr. Wimble and had the care of one of his teams; that Mr. Wimble's bailiff was in the habit of delivering out to the prisoners at stated periods, from a granary belonging to him, and of which his bailiff kept the key, such quantity of beans as Mr. Wimble thought fit to allow for the horses of this team. The beans were to be split and then given by the prisoners to the horses. It appeared that the granary-door was opened by means of a false key procured for that purpose, which was afterwards found hid in the stable; and that about two bushels of beans were taken away on the day, after an allowance had been delivered out as usual, and nearly that quantity of whole beans was found in a sack, concealed under some chaff in a chaff-bin in the stable.

The learned judge desired the jury to say whether they thought both the prisoners were concerned in taking the beans from the granary; and also whether they intended to give them to Mr. Wimble's horses. The jury answered both questions in the affirmative.

Mr. JUSTICE BAYLEY had, at the same Assizes, directed a verdict of

acquittal under circumstances of the like nature; but ABBOTT, J., was informed that the late Mr. JUSTICE HEATH had many times held this offence to be larceny, and that there had been several convictions before him; and also that to a question put by the grand jury at Maidstone to the late LORD CHIEF BARON MACDONALD, he had answered that in his opinion this offence was a larceny.

On account of this contrariety of opinion, the learned judge before whom this case was tried thought it advisable to submit the question to all the judges, the offence being a very common one; a verdict of guilty was taken, but judgment respited until the ensuing Assizes.

In Easter term, 1816, eleven of the JUDGES met and considered this case. Eight of the judges held that this was felony; that the purpose to which the prisoners intended to apply the beans did not vary the case. It was, however, alleged by some of the judges, that the additional quantity of beans would diminish the work of the men who had to look after the horses, so that the master not only lost his beans, or had them applied to the injury of the horses, but the men's labor was lessened, so that the "lucri causa," to give themselves ease, was an ingredient in the case. GRAHAM, B., WOOD, B., and DALLAS, J., thought this not a felony, and that the conviction was wrong.

REGINA *v.* JONES,

1 DEN. C. C. 188 [1846].

AT the spring Assizes, holden at Hereford, A. D. 1846, before POLLOCK, C. B.

Elizabeth Jones pleaded guilty to an indictment under the statutes 7 Wm. IV. and 1 Vict. c. 36, § 28,[1] for stealing at Ross, from an officer of the post-office, a post letter, the property of her Majesty's Postmaster-General.

The prisoner had been cook in the employ of Mrs. Garbett, of Upton Bishop, whose service she was about to leave, having herself given notice to do so, and was in treaty with a Mrs. Dangerfield, of Cheltenham, for a similar situation. Mrs. Dangerfield had consented to em-

[1] "§ 28. Every person who shall steal a post letter bag, or a post letter from a post letter bag, or shall steal a post letter from a post-office, or from an officer of the post-office, or from a mail, or shall stop a mail with intent to rob or search the same, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life." By § 40, the property may be laid in the Postmaster-General.

ploy her if a satisfactory answer from Mrs. Garbett should be returned to a letter to be written for the purpose of making inquiries respecting her character. This letter, the subject of the present indictment, was written by Mrs. Dangerfield, directed to Mrs. Garbett, and posted at Cheltenham, and was from thence duly forwarded to the post-office at Ross.

Mrs. Garbett having found fault with the prisoner for allowing the friend of another servant to breakfast in the kitchen without her leave, discharged her from her service and told her that a character would not be given to her. The day after her dismissal she went to the post-office at Ross, and there applied to the clerk on duty for the letter from Cheltenham addressed to Mrs. Garbett, stating that she was a servant in Mrs. Garbett's employ, and that Mrs. Garbett expected a letter from Cheltenham that morning, which she was to take; but upon being informed that the one letter by itself could not be given, she first took from the office all the letters for Mr. and Mrs. Garbett, including that written by Mrs. Dangerfield, the subject of the present indictment, and burnt it; but delivered the others to the person who was in the habit of conveying the letters from the Ross post-office to the inhabitants of Upton Bishop, and they reached Mr. and Mrs. Garbett in safety.

The question for the opinion of the judges was, whether the taking and destroying of the letter under these circumstances amounted to larceny.

[All the judges were present, except COLERIDGE, J., WIGHTMAN, J., and MAULE, J.]

Huddleston for the prisoner. The offence must contain all the ingredients of a common-law larceny; it must therefore appear to have been committed *lucri causa*. The evidence shows that it was not so, therefore the charge is not made out.

The word "steal" in § 28 of the statute shows that the offence there specified must contain all the ingredients of a larceny at common law. In the first report of the Criminal Law Commissioners, p. 17, it is said indeed, that "the ulterior motive by which the taker is influenced in despoiling the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial." But this is stated too broadly, for all the old writers agree in holding *lucri causa* to be an essential ingredient in larceny. Blackstone's Comm. 4, p. 231, "felonious," that is, done *animo furandi*, or as the civil law expresses it *lucri causa*. EYRE, C. B., Pear's case, East Pl. Cr. c. 16, § 2, defines larceny to be "the wrongful taking of goods with intent to spoil the owner of them *lucri causa*." GROSE, J., in delivering the opinion of the twelve judges in Hammond's case, Greaves's Russell, vol. ii. p. 2, says the true meaning of larceny

is "the felonious taking the property of another without his consent and against his will, with intent to convert it to the use of the taker." East Pl. Cr. 2, p. 553, "The wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his property, without the consent of the owner." The true meaning of *lucrum* is a gain capable of pecuniary measurement. This was not the case here. The cases which seem inconsistent with the above position are not so in reality, for in Rex *v.* Cabbage, Russ. & Ry. 292, although the majority of the judges held *lucri causa* not an essential ingredient in larceny, there was in fact a very great advantage proposed to be gained by the taking away of the horse, and one which admitted of pecuniary measurement.

POLLOCK, C. B. Suppose the prisoner had seen the letter lying on the table in the post-office and had thrown it into the fire, would that be larceny?

Huddleston. No; there would be no *lucrum.* In Rex *v.* Morfit, Russ. & Ry. 307, some of the judges thought that there was evidence of a *lucri causa.* Conf. in Re Jacklin, 1 New Sess. Cases, 280.

There are several authorities in favor of my position. In R. *v.* Blyton, Dick. Quart. Sess. 4th ed. p. 202, n. (*l*), where the prisoner indicted for larceny threw several articles of furniture into a river, in which they were destroyed, and the jury found that this was done in revenge for a supposed affront and with no intention of converting the goods to his own use, the judge directed an acquittal.

In R. *v.* Richards, 1 C. & K. 532, TINDAL, C. J., left it to the jury to say whether the taking was "to convert it to a purpose for his own profit." R. *v.* Godfrey, 8 C. & P. 563, is conclusive in favor of the prisoner, if that case be good law. There LORD ABINGER, C. B., held, that "if a person from idle curiosity, either personal or political, opens a letter addressed to another person and keeps the letter, that is no larceny, even though a part of his object may be to prevent the letter from reaching its destination."

Further, it may be contended with some reason, that the taking here was a taking of her own letter; the postmaster must be considered merely the *locum tenens* of the real owner.

Again, it is doubtful whether this be not a case of false pretences; the property in the letter was parted with by the postmaster.

Bros for the Crown. It is admitted that the stealing must be a common-law stealing. The question of property is settled by § 40 of the statute, which makes the letter the property of the Postmaster-General till delivered to its intended owner. Then, as to the false pretences, the prisoner took it *animo furandi*, and so committed a

larceny. If *lucri causa* be necessary, there is clear evidence here of a *lucri causa;* any interest is enough to satisfy those words. There is no authority for saying that *lucrum* must be a gain capable of pecuniary measurement. Neither in Morfit's nor in Cabbage's case could the advantage be measured by money.

R. *v.* Richards, 1 C. & K. 532, was a peculiar case. There, if the jury had negatived the prisoner's intention to gain anything himself, they should have negatived the whole charge, for the owners of the property were deprived of nothing. R. *v.* Godfrey, 8 C. & P. 563, seems not to be law.

But the words *lucri causa* do not form part of the common-law definition of felony; they come from the civil law. Bracton says, "furtum est secundum leges, contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerat." Coke, 3 Inst. 106, defines larceny to be "the felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another, neither from the person, nor by night, in the house of the owner."

POLLOCK, C. B. For *Mr. Huddleston's* argument, the case would be the same if the prisoner had picked the postman's pocket of the letter. I see no difference. Will it be contended that picking a man's pocket, not to make yourself rich, but to make him poor, would not be a larceny?

PARKE, B. Supposing you pick A.'s pocket to give the money to a beggar in the next street?

Cur. adv. vult.

Afterwards all the judges present, except PLATT, B., were of opinion that this was larceny; for, supposing that it was a necessary ingredient in that crime that it should be done *lucri causa* (which was not admitted), there were sufficient advantages to be obtained by the prisoner in making away with the written character. PLATT, B., doubted whether the prisoner was guilty of the offence of larceny.

REGINA *v.* PRIVETT,

1 DEN. C. C. 193; 2 C. & K. 114 [1846].

THE prisoners were tried before Mr. Justice Erle, at the spring Assizes for the county of Hants.

It was proved that the prisoners took from the floor of a barn, in the presence of the thrasher, five sacks of unwinnowed oats, and secreted them in a loft there, for the purpose of giving them to their master's

horses, they being employed as carter and carter's boy, but not being answerable at all for the condition or appearance of the horses.

The jury found that they took the oats with intent to give them to their master's horses, and without any intent of applying them for their private benefit.

The learned judge reserved the case for the opinion of the judges on the point whether the prisoners were guilty of larceny. Rex *v.* Morfit and another, Russ. & Ry. 307; Rex *v.* Cabbage, Russ. & Ry. 292.[1]

Lord Denman, C. J., Tindal, C. J., Parke, B., Patteson, J., Williams, J., Coltman, J., Rolfe, B., Wightman, J., Cresswell, J., Erle, J., and Platt, B., met to consider this case.

The greater part of the judges present (exclusive of Erle, J., and Platt, B.) appeared to think that this was larceny, because the prisoners took the oats knowingly against the will of the owner, and without color of title or of authority, with intent, not to take temporary possession merely and then abandon it (which would not be larceny), but to take the entire dominion over them, and that it made no difference that the taking was not *lucri causa*, or that the object of the prisoners was to apply the things stolen in a way which was against the wish of the owner but might be beneficial to him. But all agreed that they were bound by the previous decisions to hold this to be larceny, though several of them expressed a doubt if they should have so decided if the matter were *res integra*.

Erle, J., and Platt, B., were of a different opinion; they thought that the former decision proceeded in the opinion of some of the judges on the supposition that the prisoners would gain by the taking, which was negatived in this case; and they were of opinion that the taking was not felonious, because to constitute larceny it was essential that the prisoner should intend to deprive the owner of the property in the goods, which he could not if he meant to apply it to his use.

REGINA *v.* GUERNSEY,

1 F. & F. 394 [1858].

The prisoner was indicted for stealing ten pieces of paper, value one penny, the property of our Sovereign Lady the Queen.

In another count the property was laid to belong to Sir Edward Bulwer Lytton, the Colonial Secretary; and in a third count the property was laid to belong to Joseph Thomas Miller.

A despatch of a very important character had been received by the

[1] See Queen *v.* Elizabeth Jones, 1 Den. C C. 188.

government from Sir John Young, the Lord High Commissioner of the Islands, on the 10th of June, 1857, and another on the 14th of July of the present year, which came into the hands of Sir Edward Lytton, the Colonial Minister, in the month of August. A certain number were printed at the private printing-office of the government and which were marked "private and confidential," and were intended for distribution among the members of the Cabinet; and twenty-eight copies of these despatches were delivered at the office of the librarian at the Colonial Office for that purpose and given to the sub-librarian. He placed them on a table in the office. The prisoner frequently visited Mr. Miller at the Colonial Office and they were on extremely intimate terms. About the 23d of October the prisoner, it appeared, called upon him at the Colonial Office; and after they had had some conversation together he had occasion to leave the library for a short time, and when he went out Guernsey was standing by the fire. Mr. Miller returned in a few minutes and at this time he observed that the prisoner was standing close to the table upon which the despatches were lying with a large book upon them; and when the prisoner saw him he exclaimed, "I have not been prying into your secrets," to which Mr. Miller replied that he did not suspect that he was doing so. The prisoner remained a short time longer with Mr. Miller and they both left together.

Shortly afterwards the prisoner sent one of these printed copies of the despatch to the editor of the "Daily News" newspaper, with a note signed by the prisoner and marked "private," requesting that the despatch might be inserted in the "Daily News," and stating that no other journal had received a copy. The editor had not had any previous acquaintance with the prisoner. Before he gave directions that the despatch should appear in the "Daily News" he wrote to the prisoner at the address in Regent Square mentioned in his letter, and received a reply from him stating that it was "all right," but he did not wish his name to be mentioned in any way as connected with the publication of the document. After the receipt of this letter the editor directed the publication of the despatches in the "Daily News," and they appeared on the 12th of November. About the middle of the following week, the editor having previously received a communication from the Colonial Office, wrote to the prisoner requesting him to call upon him. The prisoner called on him and introduced himself as the person who had sent the Ionian despatches. The prisoner then stated that a person had left them at his house and he pressed the witness not to give any further information.

The witness, who produced the paper, stated that the only object for which the despatches were sent to him, as he understood, was that they might be published in the "Daily News."

There was no pecuniary inducement for the act but it rather appeared that the prisoner bore some resentment to the Colonial Minister for the refusal of an appointment.

Parry, Serjt., submitted that there was an utter absence of any felonious intention on the part of the prisoner and that it was clear that the only object he had in view was that the contents of the despatches should be made public. He urged that there was no evidence to show that the prisoner intended *permanently* to deprive the Colonial Office of the property in the despatches and cited Regina *v.* Thurborn.[1]

Martin, B. It is a question for the jury with what intent the prisoner took the despatches. The question you have to decide is whether the prisoner in taking these despatches in the manner it appears to be admitted he did it was guilty of the offence of larceny. The offence consists in the taking away the property of another without his consent and with the intention at the time to convert that property to the use of the taker. Such documents as these are clearly the subject of larceny; and inasmuch as the stealing of the paper itself would have been a felony, the fact of the paper being printed on makes no difference, and indeed this fact might in a great many instances materially increase the value. And the only question you have to decide is whether the evidence establishes to your satisfaction that at the time the prisoner took the documents away from the Colonial Office he intended to deprive that office of all property in them and to convert them to his own use. *Verdict, not guilty.*

REGINA *v.* WYNN,

3 Cox C. C. 271 [1849].

The following case was reserved from the August Session of the Central Criminal Court by Mr. Baron Platt: —

CASE.

The prisoner was tried before me on the 23d of August last at the Central Criminal Court on an indictment charging him with stealing[2] while employed in the post-office two post letters containing one half-crown, one sixpence, three postage stamps, and two sovereigns, the property of Her Majesty's Postmaster General.

He was employed in the post-office and his duty was to open the

[1] 1 Den. C. C. 388; 2 C. & K. 831. But see Regina *v.* Jones, 1 Den. C. C. 189; 2 C. &. K 236. [Reporter's Note.]

[2] Although the count for secreting was not mentioned in the case it was, as will be seen, discussed on the argument, and the opinion of the judges upon it expressed.

bags brought to the particular table at which he was placed, take out the letters, and separate them. The Scarborough bag, which contained among others the two letters described in the indictment, was brought to his table. He opened it, took out all the letters, and put them on the table before him. Twenty or thirty bags were opened on the same table by the prisoner at the same time, and the letter bills of the several bags were by him spread before him on the table. It then became his duty to separate the registered letters and unpaid letters from the unregistered paid letters, fold the registered letters in the bills, and place them in a drawer. In the course of this separation he put two unregistered letters in one of the letter bills and some of the registered letters in their respective bills in the drawer, from which he afterwards gave them to the register clerk to check the bills containing them. He afterwards put the rest of the registered letters in the drawer and carried them when collected to the register clerk. When he had done so he returned toward his table and went to a water-closet. He was observed to hold in his hand what appeared to be a bill folded over letters, was followed, and after he had placed himself with his breeches down on the seat of the water-closet, was observed to put his hands between his legs. He was immediately taken into custody. On his coming from the water-closet the two letters, sealed and unopened, lay on the paper contained in the pan.

It appeared in evidence that if through neglect the letters were not accurately sorted the person guilty of such neglect was liable to be punished.

The jury found that the prisoner having committed a mistake in the sorting of the letters in question secreted them in the water-closet in order to avoid the supposed penalty attached to such mistake.

Upon this verdict the judgment has been respited. . . .

T. J. PLATT.

Ballantine, for the prisoner. Although the indictment is not mentioned in the case there are but two counts that will come under consideration here, — one alleging the stealing and the other the secreting. It is on the second that the prosecution will principally rely after the finding of the jury. It is submitted, however, that this does not amount to a crime unless it is a stealing within the act; secreting without more will not do, because that word,[1] taken in conjunction

[1] The following is the section of the Act of Parliament upon which the judgment was framed: "That every person employed under the post-office who shall steal or shall for any purpose whatever, embezzle, secrete, or destroy a post-letter, shall be guilty of felony, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years or be imprisoned for any term not exceeding three years," etc.

with the other words of the statute, must be taken in accordance with general principles to be *ejusdem generis* with stealing, and that must be with an unlawful purpose. It therefore raises the question whether the finding of the jury will support a count for stealing. The cases of R. *v.* Elizabeth Jones, 1 Den. C. C. 188; 2 Cox's C. C. 6, s. c.; and R. *v.* Privett and Goodall, 2 C. & K. 114; 2 Cox's C. C. 40, decide what is a sufficient *lucri causa*, but there is a clear distinction between those cases and this. There there was a direct severance of the property from the owner; here there is no severance whatever. The prisoner is in possession of the letter lawfully; there is no period at which such severance can be said to have taken place. Suppose a servant to take out of his master's library a book for the purpose of reading it, and having dirtied it he destroyed it to prevent his master finding that he had done so; or suppose he threw it into the street to avoid detection, he could not be indicted for larceny.

PARKE, B. But can you speculate upon the purpose? The words of the Act of Parliament are "if he shall secrete it for any purpose whatever."

Ballantine. The argument turns on the meaning of this word "secrete." Suppose he secreted it for the purpose of delivering it to his master?

LORD DENMAN, C. J. But we must surely treat the matter with reference to the object of the Act of Parliament and not with regard to cases of ordinary larceny.

Ballantine. It is contended still that some limitation must be put upon the word "secrete," and that it is not to be taken in its widest sense. It does not appear by the finding that the prisoner ever intended to take away the entire dominion of the letter from the Post-office authorities. All that is stated is that it was secreted in the water-closet. It might have been put there for the purpose of being found by his superiors.

COLERIDGE, J. You must take the word "secrete" with reference to the facts stated by the case.

PARKE, B. Does he not put it away to derive some benefit to himself? Suppose a servant takes a chattel and locks it up in a box with intent to deprive the owner of it?

Ballantine. If he placed it there for the purpose of taking care of it, it would not be larceny, and there is no absolute presumption that it was done otherwise.

COLERIDGE, J. If he was utterly regardless as to whether it was found or not, would not that suffice? Here the delaying of the delivery of a letter for an hour is within the words and may be within the meaning of the Act.

Ballantine. If the case had found that the prisoner destroyed the letter, then that might be sufficient, for there are words in the Act of Parliament that meet such a case; but there is no such statement here.

ALDERSON, B. Because in fact he did not destroy; but does not the word "secrete" imply an attempt to destroy, which was precisely what the statute intended.

PARKE, B. Surely the whole question must be whether a man commits larceny when he makes away with property of his master to prevent inquiry. Then, as to the asportation, it occurs the moment he parts with it from his hand.

Ballantine. Then the indictment ought to state for what purpose the secreting took place.

PLATT, B. But the Court can only decide upon the case reserved; the record is not here.

LORD DENMAN, C. J. In the first place is this not a secreting within the statute? The Act of Parliament is very clear upon this point. It applies to a particular class of persons, — all those dealing with post-office letters, — and seems especially framed to meet the tortious acts which they are peculiarly capable of committing. They are entrusted with property of great value but different in character from property generally. They are not treated in the Act as ordinary thieves, but certain duties are imposed upon them in respect to the property with which they are entrusted, and it is the violation of those duties which the statute was intended to prevent; and therefore the legislature declares it a crime to secrete a letter for any purpose whatever. It is clearly not necessary under such circumstances to state in the indictment what that purpose was. This is the rule upon general principles; because the prosecutor may not know the purpose or have any means of doing so; but the point was expressly decided in the case of R. *v.* Douglas, 2 Cox's C. C. 251. There the words of the 33 Geo. III. c. 52, § 62, are that "the demanding or receiving any sum of money or other valuable thing as a gift or present, or under color thereof, whether it be for the use of the party receiving the same or for and pretended to be for the use of the East-India Company or of any person whatever," etc., shall be an offence, and it was held not necessary to state for whose use the moneys were received. The same principle applies to this indictment. The wilful secretion could not have been resorted to for no purpose. As to the question of larceny I am clearly of opinion that it is made out. We can only argue on the evidence of the case, — upon the facts and circumstances before us. We find the prisoner, who had received the letter in the course of his duty, retiring to a private place and dropping the letter under such circum-

stances that it would be probably destroyed, and this for the purpose of avoiding the penalty of previous misconduct. That is a sufficient *lucri causa*. It deprives the owner of the property. The letter was meant to be entirely withdrawn from him, for it cannot be gravely argued that it was intended he should find it. As to the *asportavit*, no doubt it occurred the moment the letter dropped from his hand. It appears to me, therefore, that the count for secreting is sustained by the evidence.

The rest of the judges concurred.

HYPOTHETICAL CASE.

A goes to a pawn-shop to borrow money on some or all of five rings. Four are pearl, and one is an onyx ring. Upon negotiation, it is agreed between A and the pawnbroker that A shall have a loan of $200 on the four pearl rings. The rings are lying upon the counter, where A has placed them. The pawnbroker hands A $200, which A counts and puts into his pocket. The pawnbroker, knowing that A has agreed to give him in pawn only the four pearl rings, nevertheless takes up from the counter all five of the rings, fraudulently claiming that they were all, by the terms of the bargain, to be held by him in pawn, and at the same moment he offers A a pawn-ticket or receipt, stating that all five rings are held by him in pawn for the $200. The pawnbroker intends at the time to deal with all five of the rings as if they had by the bargain been pledged to him for the $200. His intention to take the onyx ring was first formed immediately after the receipt and acceptance of the money by A.

Would a jury be authorized upon these facts to convict the pawnbroker of larceny of the onyx ring?

REX *v.* JACKSON,

1 Moody C. C. 119 [1826].

The prisoner was tried before Mr. Serjeant Arabin, at the Old Bailey December Sessions, in the year 1825, for stealing, in the dwelling-house of Philip Lawton, a diamond brooch, a diamond locket, a pair of gold watch cases, a watch-movement, a watch-chain, and two seals, his property, amounting in value to £34.

The prosecutor proved that he was a pawnbroker and silversmith;

and that the prisoner had often pawned goods at his shop, in his dwelling-house in Green Street, Leicester Square.

A person in the prosecutor's employ, named Burgess, and who was proved to have general authority from the prosecutor to manage his business, stated that the prisoner came to the prosecutor's shop on the 7th of March and produced duplicates of property previously pledged to the amount of £34 (namely, the property laid in the indictment), and desired it to be brought up, and a light, as he had some diamonds to seal. He then produced a small packet of diamonds, which he desired Burgess to look at and to advance the most he could upon them. Burgess looked at them and agreed to advance £160 on them; and having agreed to advance that sum, at the request of the prisoner handed them over to him to seal up, which the prisoner did in his presence, and then returned a packet, which Burgess believed to be the one containing the diamonds, it resembling it in every respect. Burgess put it into his pocket and then opened the parcels, which were found to contain the property laid in the indictment, and pledged on the 3d or 4th of March. Burgess then cast up the whole amount, which, with the interest, was £35 2*s*., and deducted it from the £160; he then left the parlor, and fetched the prisoner the balance of £124 in gold, bank notes, and silver, which, together with the goods pledged on the 3d or 4th of March, he handed over to the prisoner for the diamonds which he supposed he had got. The packet so deposited with Burgess he afterwards, in June, opened, when it was found to contain colored stones of the value of £4. He stated also that he had no authority from his master to lend money, except upon pledges of an equivalent value; and that when he delivered the money, and also the property stated in the indictment, he supposed he had an equivalent for them in the diamonds in his pocket. He further stated, that when he delivered the goods in the indictment, he parted with them entirely, thinking the diamonds left with him were of sufficient value to cover the value of them and the cash advanced; and that before he parted with them he had received the parcel, containing, as he supposed, the diamonds; that he had before examined the genuine diamonds, and might then have detained them; but as the prisoner said they might go through the hands of a second person and be changed, he handed the genuine diamonds back to the prisoner, for the special purpose only of being sealed. Upon these facts being proved,

The learned Serjeant was inclined to think that, inasmuch as the property laid in the indictment was parted with by Burgess, absolutely under the impression that the prisoner had returned him the parcel containing the diamonds, that the prisoner's offence did not amount to felony; but he felt it his duty, previous to the verdict, to submit the

substance of the facts proved to the learned judges then present, who thought, under the peculiar circumstances of the case, it would be more prudent to leave the facts to the jury; and if they convicted, afterwards to submit the case to the consideration of the twelve judges.

The jury found the prisoner guilty, and the learned Serjeant reserved the case for the opinion of the judges.

In Hilary term, 1826, the JUDGES met and considered this case; and were unanimous that the case was not larceny, because the servant, who had a general authority from the master, parted with the property and ownership, not merely with the possession.

REX *v.* DICKINSON,

RUSS. & RY. C. C. 420 [1820].

THE prisoner was tried and convicted before Mr. Justice Bayley at the summer Assizes for the county of Lancaster, in the year 1820, for stealing a straw bonnet, some other articles of female apparel, and a box.

It appeared that the prisoner entered the house where the things were in the night, through a window which had been left open, and took the things, which belonged to a very young girl whom he had seduced, and carried them to a hay-mow of his own, where he and the girl had twice before been.

The jury thought the prisoner's object was to induce the girl to go again to the hay-mow that he might again meet her there, but that he did not mean ultimately to deprive her of them.

The learned judge doubted whether this was a felony, and discharged the prisoner upon bail, and reserved the case for the consideration of the judges.

In Michaelmas term, 1820, the JUDGES met. They held that the taking was not felonious, and directed application to be made for a pardon.

CHAPTER XXIX.

LARCENY.

TAKING BY WIFE.

REGINA *v.* KENNY,

2 Q. B. D. 307; 13 Cox C. C. 397 [1877].

COURT OF CRIMINAL APPEAL.

. . . . . .

KELLY, C. B. I am of the opinion that the conviction must be quashed. This is not a case of stealing, but the prisoner has been convicted of receiving the property, well knowing it to have been stolen. It may well be that when a wife has taken away the goods of her husband with a view to an ulterior adulterous intercourse, and her adulterer has participated in the act of taking them away, he may be indicted for larceny. This view seems to have passed through the mind of Lord Campbell, C. J., in Regina *v.* Featherstone, but there is nothing in that case to show that a wife can be indicted for stealing the property of her husband. In the present case the prisoner is not convicted for stealing the property of the husband, and it is possible if he had been, the question might have arisen whether he could have been convicted upon the evidence. I am far from saying that he could not. That is not the case here; but the prisoner has been convicted of receiving, and the case fails in showing that the property could have been stolen by any other person than the prosecutor's wife. By the law of England a wife cannot steal her husband's property. If the wife has not stolen the property, there was no evidence of the property having been stolen at all, and therefore the conviction of the prisoner for receiving the property, well knowing it to be stolen, cannot be sustained.

MELLOR, J. I am of the same opinion. I agree that it cannot be said that the wife stole the property, and therefore, under the circumstances in this case, there was no evidence that the prisoner received the property, well knowing it to have been stolen. With respect to the cases of Regina *v.* Deer and Regina *v.* Featherstone, the reports in the

Law Journal show that they may be sustained in law on reasonable grounds. But those grounds are against the prosecution in this case.

Lush, J. I am of the same opinion. The property, if stolen, in this case must have been stolen by the wife. It is admitted that the wife did not steal the property when she left Burslem, as a wife cannot steal her husband's property, and they are one person in the eye of the law, and neither can be a witness for or against the other in criminal proceedings. At what time, then, did she become a thief? It is said when she became an adulteress. But how can that be? Adultery affords ground for a divorce, but the mere act of adultery does not make a difference in the status of husband and wife *per se*, and constitute the wife a thief if she takes away her husband's property. Therefore, if the property was not stolen by the wife in this case, the prisoner could not be guilty of receiving it, well knowing it to be stolen.

. . . . . .

REX *v.* WILLIS,

1 Moody C. C. 375 [1833].

The prisoner, the wife of John Willis, was tried and convicted before Mr. Justice Park, at the spring Assizes for the County of Wilts, in the year 1833, for stealing twenty-five sovereigns, ten half sovereigns, eight half crowns, and forty shillings, the property of William Orchard, and thirty or forty others, and among them the prisoner's husband; all of whom were named in the indictment.

This was a case of a friendly society held at the public-house kept by the prisoner's husband, he being a member of the society, and the box containing the property was always left in the house of the husband of the prisoner; but the box had four locks, kept by the stewards, of whom he was not one.

The facts of the case were quite clear; the wife having broken open this box and stolen a great deal of money to pay some debts of a former husband, and the jury convicted her to the learned judge's satisfaction as to the facts, but the learned judge thought it right to ask the opinion of the judges whether a wife can be convicted of larceny, in stealing money in which her husband has a joint property, and deferred the sentence.

The learned judge referred the judges to 1 Hale P. C. 514, Russell on Crimes, p. 19; Rex *v.* Bramley, Russ. & Ry. 478; and to the first case in the Old Bailey Sessions Papers for the January Sessions 1818,

tried before the learned judge, in the presence of Lord Tenterden, then Mr. Justice Abbott.

In Easter term, 1833, this case was considered at a meeting of the JUDGES, and they were of opinion that the conviction was wrong; and the prisoner was discharged.

CHAPTER XXX.

LARCENY.

WITHHOLDING NOT LARCENY.

REGINA *v.* BIRD,

12 Cox C. C. 257 [1873].

COURT OF CRIMINAL APPEAL.

CASE reserved for the opinion of this Court at the General Court of Quarter Sessions for the County of Buckingham, holden at Aylesbury, in the said county, on the 15th of October, 1872.

Elizabeth Bird was tried upon an indictment which charged that she, the said Elizabeth Bird, "on the 12th of October, 1872, 19*s.* in money, of the moneys of Maria Lovell, feloniously did steal, take, and carry away, against the peace of our Lady the Queen, her crown, and dignity."

It was proved that the said Elizabeth Bird was the daughter of a man who travelled about to fairs with a "shooting gallery" and a "merry-go-round," or "revolving velocipede machine," for riding on which he made a charge of 1*d.* to each person for each ride.

On the day in question the said Maria Lovell got into the "merry-go-round," which was then in charge of the said Elizabeth Bird, and handed to the said Elizabeth Bird a sovereign in payment for the ride, asking her to give her the change. The said Elizabeth Bird thereupon handed to the said Maria Lovell 11*d.*, and said she would give her the rest of the change when the ride was finished, as the "merry-go-round" was then about to start. The said Maria Lovell assented to this, and about ten minutes after when the ride was over, she found the said

Elizabeth Bird, who was then attending to the shooting gallery, and asked her for her change, to which the said Elizabeth Bird replied that she had only received from her 1*s.*, for which she had given the proper change, and she declined to give any more.

Upon these facts it was contended by the counsel for the prisoner: first, that the prisoner could not be convicted of stealing the 19*s.*, because no specific 19*s.* had ever been appropriated as the change for the sovereign handed to the prisoner, nor had there been a taking, either actual or constructive, of the 19*s.* from the said Maria Lovell; secondly, that under the above form of indictment, the prisoner could not be convicted of stealing the sovereign; and that even if the indictment was sufficient, there was no evidence of a felonious taking of the sovereign, as it was not taken from Maria Lovell against her will; and further, that the prisoner could not be convicted of larceny of the sovereign as a bailee, because, assuming that there was any evidence of a bailment, which was denied, the bailment was not to re-deliver the same money which was delivered to the prisoner.

I overruled the objections, and directed the jury that if they were satisfied that the said Maria Lovell gave the prisoner the sovereign, and that she knew it and wilfully refused to give the said Maria Lovell the remainder of the change, they might properly convict the prisoner of stealing the 19*s.*

The jury having returned a verdict of guilty, I reserved the above points for the consideration of the Court for the Consideration of Crown Cases Reserved, and judgment was in the meantime postponed and the prisoner admitted to bail.

The question for the opinion of the Court is whether, under the circumstances above stated, the prisoner was properly convicted on the above indictment.

Dated this eleventh day of November, 1872.

(Signed) BUCKINGHAM AND CHANDOS,
Chairman of the above Court of Quarter Sessions.

The case was first argued in the Court for the Consideration of Crown Cases Reserved, before Kelly, C. B., Martin, B., and Brett, Grove, and Quain, JJ., who directed it to be argued before all the judges.

Graham for the prisoner. The conviction cannot be supported. First, there was no larceny of the sovereign, because the prisoner was not bound to return it to the prosecutrix. To make the prisoner a fraudulent bailee she must have been bound to return the sovereign in specie: Regina *v.* Hassell, L. & C. 58; 8 Cox C. C. 491; Regina *v.* Garrett, 2 F. & F. 14; Regina *v.* Hoare, 1 F. & F. 647.

[BLACKBURN, J. May the prisoner not have been a bailee of the sovereign subject to her right of lien on it for 1*s.*?] Not here, as the sovereign was handed to the prisoner with the intention that it should become her property, and credit was given to her for the change. [COCKBURN, C. J. Was there any intention to part with the sovereign?] It is submitted that there was: Regina *v.* Thomas, 9 C. & P. 741; Rex *v.* Harvey, 1 Leach C. C. 467; Parke's Case, 2 East P. C. 671; Regina *v.* Oliver, Bell C. C. 287; Cox C. C. 384; Regina *v.* Prince, 11 Cox C. C. 145; L. Rep. C. C. R. 150; Walsh's Case, Russ. & Ry. 215; Regina *v.* Reynolds, 2 Cox C. C. 170; Rex *v.* Nicholson, 2 Leach C. C. 610. If the prosecutrix intends to part with the property, the mere fact that the possession was obtained by a fraud does not make the offence larceny: Rex *v.* Jackson, 1 Moody C. C. 119; Rex *v.* Atkinson, 2 East P. C. c. 16, § 104; Regina *v.* North, 8 Cox C. C. 433; Regina *v.* Williams, 7 Cox C. C. 355; Regina *v.* M'Kale, 37 L. J. 97, M. C.; 11 Cox C. C. 32. [COCKBURN, C. J. Suppose the prosecutrix never intended to part with the property in the sovereign until she got the 19*s.* change? MELLOR, J. Was there a voluntary parting with her entire interest in the sovereign? BLACKBURN, J. The prosecutrix never thought of giving the prisoner credit for the 19*s.* KELLY, C. B. The real question is, Was this but one transaction? A few minutes elapsing while the machine was going round is immaterial.] It is contended that the property in the sovereign was parted with, and that the prosecutrix could not have maintained an action to recover it, as she never intended to have that sovereign returned to her. Secondly, the conviction for stealing 19*s.*, as alleged in this indictment, cannot be sustained. Before the 14 & 15 Vict. c. 100, § 18, it was necessary to allege in the case of money stolen the specific coins, and it was customary to charge the stealing of so many pieces of the current coin of the realm called sovereigns, shillings, etc., as the case might be, and it was necessary to prove that some one of the specific coins alleged was stolen. To remove difficulties that had arisen on this state of the law, §18 enacts that "in every indictment in which it shall be necessary to make any averment as to any money, etc., it shall be sufficient to describe such money, etc., simply as money, without allegation so far as regards the description of the property, specifying any particular coin, and such allegation so far as regards the description of the property shall be sustained by proof of any amount of coin, although the particular species of coin of which such amount was composed shall not be proved. Now, under the allegation of stealing 19*s.* in this indictment, the prisoner could not be convicted of stealing a sovereign. That was a variance. The prosecutrix was bound to prove that shillings had been stolen. Having particularized the money stolen, it should

have been proved that shilling pieces were stolen. [GROVE, J. The allegation is not nineteen pieces of the current coin called shillings, but 19*s.* in money. BLACKBURN, J. That means, I should say, money to the value of 19*s.*] The word shilling must be taken as descriptive of the thing stolen, and must be proved: Archb. Crim. Pleadings, 190 (ed. 1862); Regina *v.* Deeley, 1 Moody C. C. 303; Regina *v.* Owen, 1 Moody C. C. 118; Regina *v.* Craven, Russ. & Ry. 46; Regina *v.* West, Dears. & B. 109; 7 Cox C. C. 183; Regina *v.* Bond, 1 Den. C. C.; Regina *v.* Jones, 1 Cox C. C. 105.

The judges retired to consider, and on their return into court,

COCKBURN, C. J., said: The majority of the judges are of opinion that the prisoner was not properly convicted of stealing the 19*s.* charged in the indictment, for she had not taken them from the prosecutrix, and could not therefore be convicted on this indictment. The majority of the judges do not say that she might not have been convicted on an indictment charging her with stealing the sovereign if the issue had been properly left to the jury.[1] Upon the present indictment, however, she must be discharged.

Conviction quashed.

REX *v.* BANKS,

RUSS. & RY. 441 [1821].

THE prisoner was tried and convicted before Mr. Justice Bayley, at the Lancaster Lent Assizes, in the year 1821, for horse-stealing.

It appeared that the prisoner borrowed a horse, under pretence of carrying a child to a neighboring surgeon. Whether he carried the child thither did not appear; but the day following, after the purpose for which he borrowed the horse was over, he took the horse in a different direction and sold it.

The prisoner did not offer the horse for sale, but was applied to to sell it, so that it was possible he might have had no felonious intention till that application was made.

The jury thought the prisoner had no felonious intention when he took the horse; but as it was borrowed for a special purpose, and that purpose was over when the prisoner took the horse to the place where he sold it, the learned judge thought it right upon the authority of

[1] In Regina *v.* Gumble [12 Cox C. C.], 248, a similar case to this, the court below amended the indictment, and substituted a sovereign for 19*s.* 6*d.*, and the Court for the Consideration of Crown Cases Reserved affirmed the conviction. [Reporter's note.]

2 East P. C. 690, 694, and 2 Russ. 1089, 1090,[1] to submit to the consideration of the judges whether the subsequent disposing of the horse, when the purpose for which it was borrowed was no longer in view, did not in law include in it a felonious taking.

In Easter term, 1821, the JUDGES met and considered this case. They were of opinion that the doctrine laid down on this subject in 2 East P. C. 690 & 694, and 2 Russell, 1089 & 1090, was not correct. They held that if the prisoner had not a felonious intention when he originally took the horse, his subsequent withholding and disposing of it did not constitute a new felonious taking, or make him guilty of felony; consequently the conviction could not be supported.

REGINA *v.* GARDNER,

9 Cox C. C. 253 [1862].

COURT OF CRIMINAL APPEAL.

THE following case was reserved at the Middlesex Sessions.

Edward Gardner was tried on an indictment charging him in the first count with stealing one banker's check and valuable security for the payment of £82 19*s.*, and of the value of £82 19*s.*, and one piece of stamped paper of the property of James Goldsmith.

In the second count the property was stated to be the property of Thomas Boucher.

It appeared from the evidence of Thomas Boucher, a lad of fourteen, that he found the check in question; that having met the prisoner Gardner, in whose service he had formerly been, he showed it to him; that the prisoner (Thomas Boucher being unable to read) told him it was only an old check of the Royal British Bank; that he wished to show it to a friend, and so kept the check; that Boucher very shortly on the same day went to the prisoner's shop and asked for the check; that the prisoner from time to time made various excuses for not giving up the check, and that Boucher never again saw the check.

It also appeared that the prisoner had an interview with Goldsmith, in which he said that he knew the check was Goldsmith's, asked what

[1] In 2 Russ. 1089, it is said that, "In the case of a delivery of a horse upon hire or loan, if such delivery were obtained *bona fide*, no subsequent wrongful conversion pending the contract will amount to felony; and so of other goods. But when the purpose of the hiring or loan for which the delivery was made, has been ended, felony may be committed by a conversion of the goods."

reward was offered, and upon being told 5*s*., said he would rather light his pipe with it than take 5*s*.

The check has never been received either by Goldsmith or Boucher, though there was some evidence (not satisfactory) by the prisoner's brother of its having been inclosed in an envelope and put under the door of Goldsmith's shop.

The jury found, "That the prisoner took the check from Thomas Boucher in the hopes of getting the reward; and, if that is larceny, we find him guilty."

Thereupon the judge directed a verdict of guilty to be entered, and reserved for the opinion of this Court whether upon the above finding the prisoner was properly convicted.

. . . . . .

POLLOCK, C. B. In this case the prisoner was convicted of stealing a check. He took the check away from a boy who found it, and did not immediately give information to the owner, but withheld it in the expectation of getting a reward. The taking of the check from the finder was not a felonious taking, and the merely withholding it in the expectation of a reward was not a larceny.

The rest of the Court concurring, *Conviction quashed.*

CHAPTER XXXI.

LARCENY.

INVASION OF A WRONGFUL POSSESSION.

COMMONWEALTH *v.* FINN,

108 MASS. 466 [1871].

INDICTMENT containing two counts, the first for robbing Richard Dootson, the second for receiving thirty-one gold sovereigns, of the property of Dootson, knowing them to have been stolen.

At the trial in the Superior Court for Norfolk, before Dewey, J., it appeared that Dootson stole the sovereigns from their real owner and afterwards on the same day was robbed of them by Lot Armstrong; and there was evidence that the defendant received the

sovereigns from Armstrong. As to the defendant's guilty knowledge, there was conflicting testimony; and he introduced evidence of good character, and that he was drunk at the time when the sovereigns were received.

The judge, against the objection of the defendant, instructed the jury that they would be authorized to find the ownership of the sovereigns to be in Dootson, if they were satisfied that he had actual possession of them at the time of the robbery; and on the question of guilty knowledge instructed them that, if the defendant received the sovereigns under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen, they would be authorized to find the guilty knowledge charged.

The jury returned a verdict of not guilty on the first count and guilty on the second count; and the defendant alleged exceptions.

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WELLS, J. In charging the robbery, the goods stolen were properly described as being of the property of the person from whom they were taken; although as against the true owner he had no title or right in the goods, and his possession was tortious. Besides the authorities cited by the Attorney General, see Rosc. Crim. Ev. (6th ed.) 602, 604, and cases there referred to. The decision in Commonwealth *v.* Morse, 14 Mass. 217, seems to have been a departure from the rule at common law, and has been corrected by statute. Rev. Sts. c. 133, § 11. Gen. Sts. c. 172, § 12.

The defendant does not controvert this as applied to an indictment for larceny or robbery. But as the conviction in this case was only upon the count for receiving the stolen goods, it is contended that this offence must have been subsequent to the termination of the possession of the original thief, so that ownership at that time could not properly be alleged to be in him. There are two answers to this objection, either of which we think is sufficient.

1. Possession is *prima facie* evidence of title. Against all persons not having a better right, it constitutes or rather answers for a right of property. An action alleging property may be maintained upon it; because a mere stranger, who derives no title, right, or authority from the previous owner, cannot set up his title against the right thus gained by possession. Burke *v.* Savage, 13 Allen, 408. This is true, not only as against one who disturbs that possession; but if the possession is not parted with voluntarily, it is equally so against any one who afterwards meddles with the property without right.

2. The offence of receiving stolen goods is accessory only to the principal offence of larceny. The receiver is an accessary after the fact. The principal offence being established, either by proof of

the facts or by production of a record of conviction therefor, it is only necessary to show further the receipt of the goods (involving of course their identity) and guilty knowledge. Identity of the property involves the element of ownership as an essential part of its description; but if there has been a conviction of the principal offender, the record establishes the ownership sufficiently for all purposes of the prosecution against the accessories. Identity in substance is all that is then required to be proved. It must follow, we think, that in any prosecution against the receiver an allegation of ownership is good, if it be such as would be sufficient to maintain a prosecution for the principal offence of larceny of the same goods. The thief and the receiver may be joined in the same indictment. Commonwealth *v.* Adams, 7 Gray, 43. It would be strange if the same allegation of ownership would not be good against both parties in such an indictment.

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CHAPTER XXXII.

LARCENY.

CONVENTIONAL TAKING BY BRINGING GOODS INTO NEW JURISDICTION.

COMMONWEALTH *v.* HOLDER,

9 GRAY, 7 [1857].

INDICTMENT for stealing at Milford in this county goods of Henry W. Dana. At the trial in the Court of Common Pleas there was evidence that the defendant broke and entered the shop of said Dana at Smithfield in the State of Rhode Island, and stole the goods mentioned in the indictment, and brought them into this county. The defendant asked that the jury might be instructed that the indictment could not be maintained, because the courts of this State could not take cognizance of a larceny committed in another State. But Mellen, C. J., refused so to instruct the jury, and instructed them that the evidence, if believed, was sufficient to support the indictment. The defendant being convicted alleged exceptions.

SHAW, C. J. A majority of the court are of opinion that this case must be considered as settled by the case of Commonwealth *v.* Uprichard, 3 Gray, 434, and the principles stated and the precedents

cited. Though to some extent these colonies before the Revolution were distinct governments and might have different laws, it was not unreasonable, as they all derived their criminal jurisprudence from the English common law, to regard the rule applicable to a theft in an English county of goods carried by the thief into another as analogous, and adopt it. We are of opinion that Massachusetts did adopt it, and this is established by judicial precedent, before and since the Revolution, and is now settled by authority as the law of this State.

THOMAS, J. The real question in this case is, whether the defendant can be indicted, convicted, and punished in this Commonwealth for a larceny committed in the State of Rhode Island. If it were a new question, it would be enough to state it. The obvious, the conclusive answer to the indictment would be that the offence was committed within the jurisdiction of another, and, so far as this matter is concerned, independent State, of whose law only it was a violation, and of which its courts have exclusive cognizance. By the law of that State the offence is defined and its punishment measured; by the law which the defendant has violated he is to be tried. Whether the acts done by him constitute larceny, and, if so, of what degree, must be determined by that law. Its penalties only he has incurred; its means of protection and deliverance he may justly invoke, and especially a trial by a jury of his peers in the vicinage where the offence was committed.

This obvious view of the question will be found upon reflection, I think, to be the only one consistent with the reasonable security of the subject or the well defined relations of the States. It is well known that the laws of the States upon the subject of larceny materially differ. In most of them the common law of larceny has been greatly modified by statutes. The jurisprudence of all is not even based on the common law; in several the civil law obtains.

In cases where a difference of law exists, by which law is the defendant to be judged, — the law where the offence (if any) was committed, or where it is tried? For example, the defendant is charged with taking with felonious intent that which is parcel of the realty, as the gearing of a mill or fruit from a tree. By the St. of 1851, c. 151, the act is larceny in this Commonwealth. If it appears that in the State where the act was done it was, as under the common law, but a trespass, which law has the defendant violated and by which is he to be tried? Or suppose the defendant to be charged with the stealing of a slave, — a felony in the State where the act is done but an offence not known to our laws. The difficulty in both cases is the same. You have not only conflicting jurisdictions but different rules of conduct and of judgment.

But supposing the definitions of the offence to be the same in the two States, the punishments may be very different. Where such difference exists, which penalty has the defendant justly incurred and which is he to suffer? For example, the offence is punishable by imprisonment in Rhode Island, say for a year; in this State the same offence is punishable by imprisonment from one to five years; is the defendant liable to the heavier punishment? Or suppose he has been convicted in Rhode Island, and in consideration of his having indemnified the owner for the full value of the goods taken, his punishment has been more mercifully measured to him, can he, after he has suffered the punishment, and because the goods were, after the larceny, brought into this State, be made to suffer the penalty of our law for the same offence? Or suppose him to have been convicted in Rhode Island and a full pardon extended to him, can he be tried and convicted and punished here?

Again: the power to indict, convict, and punish the offence in this State proceeds upon the ground that the original caption was felonious. If the original taking was innocent or but a trespass, the bringing into this State would not constitute a larceny. You must therefore look at the law of the State where the first caption was made. And how is the law of another State to be ascertained? What is the law of another State is a question of fact for the jury. The jury in this way are in a criminal case made not only to pass upon the law, but to pass upon it as a matter of evidence, subject, strictly speaking, neither to the direction nor the revision of the court.

Again: the defendant is indicted here for the larceny committed in Rhode Island; while in custody here awaiting his trial, he is demanded of the Executive of this State by the Executive of Rhode Island as a fugitive from the justice of that State, under the provisions of the Constitution of the United States, art. 4, § 2, and the U. S. St. of 1793, c. 45. Is he to be tried here, or surrendered up to the State where the offence was committed and tried there? Or if he has been already tried and convicted and punished in this State, is he to be sent back to Rhode Island to be tried and punished again for the same offence? And would his conviction and punishment here be any answer to the indictment there? Or if he has been fully tried and acquitted here and then demanded by the Executive of Rhode Island, is he, upon requisition, to be sent to that State to be again tried, to be twice put in jeopardy for the same offence? It is quite plain no ground in law would exist for a refusal to surrender.

The defendant was indicted for larceny, not for the offence of bringing stolen goods into the Commonwealth. He was, under the instruction of the presiding judge, tried for the larceny in Rhode Island, was

convicted for the larceny in Rhode Island, and must be punished, if at all, for the larceny in Rhode Island. And under the rule given to the jury is presented a case where, for one and the same moral act, for one and the same violation of the rights of property, the subject may be twice convicted and punished. Nay more, if a man had stolen a watch in Rhode Island and travelled with it into every State of the Union, he might, under the rule given to the jury, if his life endured so long, be indicted and punished in thirty-two States for one and the same offence.

And it is well to observe that it is the retention of the property which is the cause of the new offence, and the carrying of it from the place of caption into another State. If the defendant had stolen property in Rhode Island and consumed or destroyed it, and then had removed to Massachusetts, but one offence would have been committed, and that in Rhode Island.

Such are some of the more obvious difficulties attending the position that an offence committed in one State may be tried and punished in another. The doctrine violates the first and most elementary principles of government. No State or people can assume to punish a man for violating the laws of another State or people. The surrender of fugitives from justice, whether under the law of nations, treaties with foreign powers, or the provisions of the Constitution of the United States, proceeds upon the ground that the fugitive cannot be tried and punished by any other jurisdiction than the one whose laws have been violated. Even in cases of the invasion of one country by the subjects of another, it is the violation of its own laws of neutrality that the latter country punishes, and not the violation of the laws of the country invaded. The exception of piracy is apparent rather than real. Piracy may be punished by all nations because it is an offence against the law of nations upon the seas, which are the highways of nations.

The ruling of the learned Chief Justice of the Common Pleas was, I may presume, based upon the decisions of this court in Commonwealth *v.* Cullins, 1 Mass. 116, and Commonwealth *v.* Andrews, 2 Mass. 14.

It is certainly the general duty of the court to adhere to the law as decided. Especially is this the case where a change in the decision would impair the tenure by which the rights and property of the subject are held. But even with respect to these, where it is clear a case has been decided against the well settled principles of law and of reason, it is the duty and the practice of the courts to revise such decision, and to replace the law on its old and solid foundation. This is peculiarly the duty of the courts where such decision works its injustice by impairing the personal rights of the citizen, or by subjecting him to burdens and penalties which he never justly incurred.

In my judgment, the courts of this Commonwealth have not, and never had, under the Constitution of the United States or otherwise, the rightful power to try a man for an offence committed in another State. It is in vain, it seems to me, to attempt to preserve and make rules of conduct decisions founded upon wholly erroneous views of the relations which the States of the Union bear to each other under the Constitution, and in conflict with well settled principles of constitutional and international law.

I should be content to rest my dissent from the judgment of the Court in the case at bar upon the principles affirmed in the recent case of Commonwealth *v.* Uprichard, 3 Gray, 434. In effect that case overrules, as its reasoning thoroughly undermines, the earlier cases. They cannot stand together.

But as the decision in the case at bar rests upon the authority of the cases in the first and second of Massachusetts Reports, it may be well to examine with care the grounds upon which they rest. Such an examination will show, I think, not only that the cases were put upon erroneous views as to the relation of the States, but that they were also unsound at common law.

In the case of Commonwealth *v.* Cullins, a jury trial where three judges of the court were present, the evidence showing that the goods were taken in the State of Rhode Island, Mr. Justice Sedgwick, who charged the jury, said that "the Court were clearly of opinion that stealing goods in one State and conveying stolen goods into another State was similar to stealing goods in one county and conveying the stolen goods into another, which was always holden to be felony in both counties." Whatever the points of similarity, there was this obvious and vital difference, to wit, that conviction in one county was a bar to conviction in another, and that conviction in one State is no bar to conviction in another State.

It was a doctrine of the common law that the asportation of stolen goods from one county to another was a new caption and felony in the second county, — a legal fiction devised for greater facility in convicting the offender where it was uncertain where the first caption took place. The foundation of the rule was that the possession of the owner continued, and that every moment's continuance of the trespass may constitute a caption as well as the first taking. But in what respect was the taking in one State and conveying into another State similar to the taking in one county and conveying into another county? It could only be "similar" because the legal relation which one State bears to another is similar to that which one county bears to another; because, under another name, there was the same thing. If a man is to be convinced of crime by analogy, the analogy certainly should be a close

one. Here it was but a shadow. In the different counties there was one law, one mode of trial, the same interpretation of the law, and the same punishment. The rule, mode of trial, and jurisdiction were not changed.

The States of the Union, it is quite plain, hold no such relation to each other. As to their internal police, their law of crimes and punishments, they are wholly independent of each other, having no common law and no common umpire. The provision indeed in the Constitution of the United States for surrendering up fugitives from justice by one State to another is a clear recognition of the independence of the States of each other in these regards. It excludes the idea of any jurisdiction in one State over crimes committed in another, and at the same time saves any necessity or reason for such jurisdiction. Nor is there any provision in the Constitution of the United States which impairs such independence, so far as the internal police of the States is concerned. On the other hand, the widest diversity exists in the institutions, the internal police, and the criminal codes of the several States, some of them, as Louisiana and Texas, having as the basis of their jurisprudence the civil and not the common law. In the relation which Louisiana holds to this State can any substantial analogy be found to that which Surrey bears to Middlesex?

An analogy closer and more direct could have been found in the books when Commonwealth *v.* Cullins was decided. It was that of Scotland to England, subject both to one crown and one legislature; yet it had been decided that when one stole goods in Scotland and carried them to England, he could not be convicted in the latter country. Rex *v.* Anderson (1763), 2 East P. C. 772; 2 Russell on Crimes (7th Amer. ed.), 119. Or an analogy might have been found in the cases of goods stolen on the high seas and brought into the counties of England, of which the courts of common law refused to take cognizance because they were not felonies committed within their jurisdiction. 1 Hawk. c. 33, § 52; 3 Inst. 113. In these cases a test would have been found, applicable to the alleged larceny of Cullins, to wit, the offence was not committed in a place within the jurisdiction of the court, but in a place as foreign to their jurisdiction, so far as this subject-matter was concerned, as England or the neighboring provinces. The case of Commonwealth *v.* Cullins has no solid principle to rest upon.

The case of Commonwealth *v.* Andrews, two years later, may be held to recognize the rule laid down in Commonwealth *v.* Cullins, though it was an indictment against Andrews as the receiver of goods stolen by one Tuttle in New Hampshire; and though there is, at the least, plausible ground for saying that there was a new taking by

Tuttle at Harvard in the county where the defendant was indicted and tried. Indeed, Mr. Justice Parker takes this precise ground; though he adds that "the common-law doctrine respecting counties may well be extended by analogy to the case of States united, as these are, under one general government." If that union was with reference to or concerned the internal police or criminal jurisprudence of the several States; if it was not obviously for other different, distinct, and well defined purposes; and if we could admit the right of the court to extend by analogy the provisions of the criminal law and so to enlarge its jurisdiction, there would be force in the suggestion. As it is, we must be careful not to be misled by the errors of wise and good men.

Judge Thatcher puts the case wholly on the felonious taking at Harvard.

Mr. Justice Sedgwick, though having the same view as to the taking at Harvard, does not rest his opinion upon it, but upon the ground that the continuance of the trespass is as much a wrong as the first taking. This doctrine applies as well where the original caption was in a foreign country as in another State of the Union. If you hold that every moment the thief holds the property he commits a new felony, you may multiply his offences *ad infinitum*; but in so carrying out what is at the best a legal fiction, you shock the common sense of men and their sense of justice. Mr. Justice Sedgwick will not admit the force of the objection that the thief would be thus twice punished, but regards with complacency such a result. But as we are to presume that the punishment is graduated to the offence, and as far as punishment may expiates the wrong, the mind shrinks from such a consequence. But saying that whatever he might think upon this question if it were *res integra*, he puts his decision upon the case of Paul Lord decided in 1792, and that of Commonwealth *v.* Cullins.

Chief Justice Dana relies upon the cases before stated and a general practice, and also upon the principle that every moment's felonious possession is a new caption.

Such was the condition of the law in this State when the case of Commonwealth *v.* Uprichard came before the court. In that case the original felonious taking was in the province of Nova Scotia. The bringing of the stolen goods into this Commonwealth was held not to be a larceny here. But if it be true that every act of removal or change of possession is a new caption and asportation, that every moment's continuance of the trespass is a new taking, — if this legal fiction has any life, it is difficult to see why the bringing of the goods within another jurisdiction was not a new offence. No distinction in principle exists between this case and a felonious taking in another State and bringing into this. So far as the law of crimes and punishments is

concerned, the States are as independent of each other as are the States and the British Provinces.

The case of Commonwealth *v.* Uprichard rests, I think immovably, upon the plain grounds that laws to punish crime are local and limited to the boundaries of the States which prescribe them; that the commission of a crime in another State or country is not a violation of our law, and does not subject the offender to any punishment prescribed by our law. These are principles of universal jurisprudence, and as sound as they are universal.

It is sometimes said that after all the offender is only tried and convicted for the offence against our laws. This clearly is not so. It is only by giving force to the law of the country of the original caption that we can establish the larceny. It is the continuance of the caption felonious by the law of the place of caption. In the directions given to the jury such effect is given to the laws of Rhode Island. The jury were instructed that if the defendant broke and entered into the shop of Henry W. Dana in Smithfield in Rhode Island and thence brought the goods into this county, the indictment could be maintained. The felonious taking in Rhode Island is the inception and groundwork of the offence. The proceeding is in substance and effect but a mode of enforcing the laws of and assuming jurisdiction over offences committed in another State.

For the reasons thus imperfectly stated, I am of opinion that the instructions of the Court of Common Pleas were erroneous, that the exceptions should be sustained, the verdict set aside, and a new trial granted. *Exceptions Overruled.*

REX *v.* SIMMONDS,

1 Moody C. C. 408 [1834].

The prisoner was convicted before Mr. Justice Gaselee, at the spring Assizes 1834, for the County of Kent, of stealing two geldings in that county.

The horses were stolen in Sussex. The prisoner was apprehended with them at Croydon in Surrey. The only evidence to support the charge of stealing in Kent was, that when the prisoner was apprehended at Croydon, he said he had been at Dorking to fetch them, and that they belonged to his brother, who lived at Bromley. The police officer offered to go to Bromley. They took the horses and went as far as Beckenham church, when the prisoner said he had left a parcel at the Black Horse, in some place in Kent. The police officer accordingly

went thither with him, each riding one of the horses; when they got there the officer gave the horses to the hostler. The prisoner made no inquiry for the parcel but made his escape, and afterwards was again apprehended in Surrey. The prisoner was convicted, but the learned judge did not pass sentence upon him, reserving the question whether there were any evidence to support the indictment in Kent.

At a meeting of all the JUDGES in Easter term, 1834, they were unanimously of opinion that there was no evidence to be left to the jury of stealing in Kent, and that no judgment ought to be given upon this conviction, but that the prisoner should be removed to Surrey.

STATE *v.* BARTLETT,[1]

11 VERMONT 650 [1839].

INDICTMENT for stealing two oxen. Plea, not guilty.

Upon the trial in the court below testimony was introduced tending to show that the respondent stole the oxen in the Province of Lower Canada and drove them into this county, where he sold them.

The respondent contended that though the jury should find the facts which the testimony tended to prove, still the indictment could not be maintained. But the Court charged the jury that if they found from the testimony that the oxen were stolen by the respondent in Canada, and were driven by him into this county, the indictment was sustained. To the charge of the Court the respondent excepted. The jury returned a verdict of guilty. After verdict the respondent filed a motion in arrest of judgment because the minute made by the clerk of the court upon said indictment did not show the "day, month, and year" when it was filed. The minute of the clerk was as follows: "Orleans County Court, Dec. T. 1838. Received and filed this 29th, 1838."

The Court overruled the motion, to which the respondent also excepted.

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REDFIELD, J. . . . The only remaining ground urged by the respondent's counsel is that an indictment for larceny cannot be sustained here where the original caption was in the Province of Canada. If this question were entirely new and to be now decided upon the weight of authority at common law, I confess I should incline to the view taken

[1] [See Commonwealth *v.* Uprichard, 3 Gray, 434; Cummings *v.* State, 1 Har. & Johns. 340; Hamilton *v.* State, 11 Ohio, 434; State *v.* Ellis, 3 Conn. 185; Simmons *v.* Commonwealth, 5 Binn. 617; State *v.* Brown, 1 Hayn. 100; Simpson *v.* State, 4 Humph. 456.]

by the respondent's counsel. For it is expressly laid down by all the English law writers upon this subject that "if the original taking be such whereof the common law cannot take cognizance, or if the goods be taken at sea, the thief cannot be indicted of the larceny in any county into which he shall carry them." 2 Russell on Crimes, 175. The case of the Pirates, 3 Inst. 113; 1 Hawk. P. C. c. 33, § 32. The same exceptions obtained in regard to goods taken in any other part of the United Kingdom and brought into any county in England. Rex v. Anderson, 2 East's P. C. c. 16, § 156, p. 772. These obstacles were removed by the statute of 45 & 54 Geo. III., and 7 & 8 Geo. IV.

But in this State the rule has been too long settled and recognized by too long and uniform a course of practice and decision to be now changed unless it be by act of the legislature. We think, too, that the reasons are quite sufficient why the law, upon principles of mere policy, should not be changed.

Larceny consists in the felonious taking and carrying away of the goods of another. It implies a forcible violation of the right of the owner in regard to possession as well as property; and that this should be done secretly or feloniously. Now precisely the same reason found in all the books why the offender is guilty of larceny in every county into which he conveys the goods, — namely, "that every moment's continuance of the trespass and felony amounts to a new caption and asportation," — will apply to the present case with the same force of its original use. Hence it has been decided that where goods are taken in one of the United States and brought into another the offender may be indicted in the latter State and there tried. State v. Mockridge, decided by this court some years since in the County of Chittenden and not reported. The same rule obtains in some of the other States. Commonwealth v. Cullins, 1 Mass. R. 116; Commonwealth v. Andrews, 2 Mass. 14; State v. Ellis, 3 Conn. 185. New York and North Carolina have decided otherwise.

It is believed no good reason can be urged why the rule should apply as between the American States and not extend to all countries. These States so far as punishment for crimes is concerned are as foreign to each other as distinct nations. There could be no pretence that in the case of Mockridge the stealing of money in the State of New York was any more punishable here than if he had taken it in Canada or even in a country where there is no law on the subject. It could only be upon the ground that the bringing the money into this State "amounted to a new caption and asportation" like the carrying of goods feloniously through more than one county, which is indictable in either county. Such has been the long established practice in this State. A case is mentioned by one of my brethren as having occurred

while the late Judge Tichenor was Chief Justice of this court, where the original taking was in Canada and the offender was convicted here. Other cases of a similar character are known to have occurred in the State at different periods. We are not disposed to relax the rule. The argument that it might operate severely upon offenders who took property in a remote section of the Union, and after having carried it through many intervening States should finally be arrested, having passed perhaps a jurisdiction where larceny was a capital offence, is one of those arguments *ab inconvenienti* which are always specious but not always safe to be relied upon. It is sufficient to say that no country not absolutely barbarous would ever presume to punish any one a second time for the same offence. Again, it would never be in the power of a second jurisdiction to punish the same offence unless the first jurisdiction, after having inflicted the utmost punishment, should surrender the expiated offender to be still further punished, which is not a supposable case in any Christian country.

The judgment of the Court is that the respondent take nothing by his exceptions and motion.

No further objections being urged he was sentenced to confinement in the State prison.

REGINA *v.* CARR,

15 Cox C. C. 131, note [1877].

JOHN CARR was indicted for stealing 168 bonds of the Peruvian Government, the property of Lionel Cohen and others; second count, for feloniously receiving the same.

There were other counts charging him as an accessary before and after the fact.

The bonds in question on the 2d June, 1877, were transmitted by the prosecutors to a customer in Paris. They were traced safely as far as Calais, and were stolen from the train after leaving that place.

On the 4th of September the prisoner was found dealing with them in London, and the question arose as to the jurisdiction of this court to try the case, the robbery having been committed in France.

The *Solicitor-General* submitted that the prosecutors never having parted with their property in the bonds, they were still under the protection of the law and that the subsequent possession of the bonds in this country was sufficiently recent to enable the jury to find a verdict of larceny against a person who was dishonestly dealing with them here. The decision in Rex *v.* Prowes, 1 Moody C. C. 349, was certainly opposed to this view, but no reasons were given for that judg-

ment and a doubt as to the soundness of the decision was expressed by Parke, B., in Regina *v.* Madge, 9 C. & P. 29. The case of Regina *v.* Debrueill, 11 Cox C. C. 207, was referred to. As to the counts charging the prisoner with receiving and also as an accessary, the 24 & 25 Vict. c. 94 contemplated a case of this kind where the original offence was committed abroad.

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DENMAN, J. There can be no doubt that this was a larceny fully completed in France. I do not at all say that it might not be a very reasonable thing that any one afterwards dealing here with property so stolen might make cogent evidence of having received them knowing them to have been stolen just as much as if they had been stolen in England; but it appears to me that the point has been too solemnly decided for me to give the go-by to those decisions. It has been solemnly decided and acted upon so often that there is no jurisdiction in England to try a case where the stealing has been committed abroad, either against the principal or the accessary, that I have nothing to do but to act upon those decisions and to direct an acquittal in this case. I entertain no doubt that the case of Rex *v.* Prowes (*ubi sup.*) is directly in point, and Regina *v.* Madge (*ubi sup.*) fortifies it to the extent of recognizing and acting upon it. Debrueill's case also decides that a conviction of receiving under similar circumstances could not be sustained. The prisoner must therefore be acquitted.

REX *v.* PROWES,[1]

1 MOODY C. C. 349 [1832].

THE prisoner was tried and convicted before Mr. Selwyn, K. C., at the spring Assizes for the County of Dorset in the year 1832, and ordered to be transported for seven years; but the execution of the sentence was respited in order that the opinion of the judges might be taken on the case.

The indictment charged the prisoner with stealing at Dorchester, in the County of Dorset, a quantity of wearing apparel, the property of Thomas Cundy. The things had been taken by the prisoner from a box of the prosecutor's at St. Helier's in the island of Jersey, while the prosecutor was absent at his work at a short distance, and without his leave; they were shortly afterwards found in the possession of the prisoner at Weymouth, in the County of Dorset, where he had been apprehended on another charge.

[1] [See Rex *v.* Anderson, 2 East. P. C. 772; Regina *v.* Debruiel, 11 Cox C. C. 207 (1861).]

A doubt occurred whether the original taking was such whereof the common law could take cognizance; and if not whether the case fell within the statute 7 & 8 G. IV. c. 29, § 76; or in other words whether the island of Jersey could [be] considered as part of the United Kingdom. 2 Russell, 175. If the original taking be such whereof the common law cannot take cognizance, as if the goods be stolen at sea, the thief cannot be indicted in any county into which he may carry them. 3 Inst. 113; 1 Haw. P. C. 33, § 92. A similar exception prevailed formerly where the original taking was in Scotland or Ireland; and it appears to have been holden that a thief who had stolen goods in Scotland could not be indicted in the County of Cumberland, where he was taken with the goods. Rex *v.* Anderson and others, Carlisle summer Assizes, 1763; and before the judges, November, 1763; 2 East, 772, c. 16, § 156.

This case was considered at a meeting of all the JUDGES (except LORD LYNDHURST, C. B., and TAUNTON, J.,) in Easter term, 1832; and they held unanimously that the conviction was wrong and that the case was not within 7 & 8 G. IV. c. 29, § 76.

CHAPTER XXXIII.

LARCENY.

THE PHYSICAL ACT OF TAKING.

REX *v.* WALSH,

1 MOODY C. C. 14 [1824].

THE prisoner was tried before Thomas Denman, Esquire, Common Serjeant, at the Old Bailey Sessions, January, 1824, on an indictment for stealing a leathern bag containing small parcels, the property of William Ray, the guard to the Exeter mail.

At the trial it appeared that the bag was placed in the front boot, and the prisoner, sitting on the box, took hold of the upper end of the bag, and lifted it up from the bottom of the boot on which it rested. He handed the upper part of the bag to a person who stood beside the wheel on the pavement, and both had hold of it together, endeavoring to pull it out of the boot, with a common intent to steal it.

Before they were able to obtain complete possession of the bag, and while they were so engaged in trying to draw it out, they were interrupted by the guard and dropped the bag.

The prisoner was found guilty, but the facts above stated were specially found by the jury, in answer to questions put to them by the Common Serjeant.

The Common Serjeant entertaining some doubts whether the prisoner could be truly said to have "stolen, taken, and carried away" the bag, he respited the judgment, in order that the opinion of the judges might be taken on the case.

In Easter term, 1824, the JUDGES met and considered this case. They held the conviction right, being of opinion that there was a complete *asportation* of the bag.

REGINA *v.* WHITE,

1 DEARS. C. C. 203; 6 Cox C. C. 213 [1853].

THE prisoner was indicted at the last Quarter Sessions for Berwick-upon-Tweed for stealing 5000 cubic feet of carburetted hydrogen gas of the goods, chattels, and property of Robert Oswald and others. Mr. Oswald was a partner in the Berwick Gas Company, and the prisoner, a householder in Berwick, had contracted with the company for the supply of his house with gas to be paid for by meter. The meter, which was hired by the prisoner of the company, was connected with an entrance pipe through which it received the gas from the company's main in the street, and an exit pipe through which the gas was conveyed to the burners. The prisoner had the control of the stop-cock at the meter, by which the gas was admitted into it through the entrance pipe, and he only paid the company and had only to pay them for such quantity of gas as appeared by the index of the meter to have passed through it. The entrance and exit pipes were the property of the prisoner. The prisoner, to avoid paying for the full quantity of gas consumed and without the consent or knowledge of the company, had caused to be inserted a connecting pipe with a stop-cock upon it into the entrance and exit pipes and extending between them; and the entrance pipe being charged with the gas of the company, he shut the stop-cock at the meter so that gas could not pass into it, and opened the stop-cock in the connecting pipe, when a portion of the gas ascended through the connecting pipe into the exit pipe and from thence to the burners and was consumed there, and the gas continued so to ascend and be consumed until by shutting the stop-cock in the connecting pipe the supply was cut off. This operation was proved to

have taken place at the time specified by the prosecutor. It was contended for the prisoner that the entrance pipe into which the gas passed from the main being the property of the prisoner, he was in lawful possession of the gas by the consent of the company as soon as it had been let into his entrance pipe out of their main, and that his diverting the gas in its course to the meter was not an act of larceny. I told the jury that if they were of opinion on the evidence that the entrance pipe was used by the company for the conveyance of the gas by the permission of the prisoner, but that he had not by his contract any interest in the gas or right of control over it until it passed through the meter, his property in the pipe was no answer to the charge that there was nothing in the nature of gas to prevent its being the subject of larceny; and that the stop-cock on the connecting pipe being opened by the prisoner and a portion of the gas being propelled through it by the necessary action of the atmosphere and consumed at the burners, there was a sufficient severance of that portion from the volume of gas in the entrance pipe to constitute an *asportavit* by the prisoner; and that if the gas was so abstracted with a fraudulent intent he was guilty of larceny. The jury answered the questions put to them in the affirmative and found the prisoner guilty; I postponed judgment, taking recognizance of bail according to the statute for the appearance of the prisoner at the next Sessions to receive judgment if this court should be of opinion that he was rightly convicted.

Ballantine for the prisoner. The prisoner was not guilty of larceny. He received the gas with the full consent of the company, and the evidence only shows that he did not account with the company according to his contract. The prisoner was guilty of fraud in evading the accounting by the meter, but his conduct was not felonious.

Lord Campbell, C. J. He took the gas from the company against their will instead of receiving it properly and accounting for it.

Ballantine. The Gas Works Clauses Act, 10 Vict. c. 15, § 18, provides a specific penalty for this very offence, which would hardly have been done if it had been regarded as a larceny.

Maule, J. That clause may be intended to provide against frauds of a different kind, such as damaging the machinery or altering the index of the meter, which would not be larceny.

Lord Campbell, C. J. Is not this a taking *invito domino?*

Ballantine. The delivery of the gas is voluntary and the possession was not obtained by fraud.

Maule, J. The taking was by turning the gas into a new channel without the leave of the company and that was done with intent to defraud.

Ballantine. There was no trespass.

MAULE, J. If this gas when taken was in the lawful possession of the prisoner and he was only guilty of a breach of contract in not accounting, you must say the same of the surreptitious introduction of new burners.

Ballantine. An evasion of the meter and an interference with it stand on the same ground. The meter is only the voucher of an account, and if there is a delivery according to contract on the one hand and only a fraudulent dealing with a voucher on the other, there is no larceny.

LORD CAMPBELL, C. J. I think that the conviction ought to be affirmed and that the direction of the learned recorder was most accurate. Gas is not less a subject of larceny than wine or oil; but is there here a felonious asportation? No one who looks at the facts can doubt it. The gas no doubt is supplied to a vessel which is the property of the prisoner, but the gas was still in the possession of the company. Then, being in the possession of the company and their property, it is taken away *animo furandi* by the prisoner. If the property remains in the company until it has passed the meter, — which is found, — to take it before it has passed the meter constitutes an asportation. If the asportation was with a fraudulent intent — and this the jury also have found — it was larceny. As to the Act of Parliament the legislature has for convenience sake added a specific penalty, but that cannot reduce the offence to a lower degree. My brother Maule has, however, given a probable explanation of that provision.

PARKE, B., MAULE, J., TALFOURD, J., and MARTIN, B., concurred.

Conviction affirmed.

REGINA v. HANDS,

16 Cox C. C. 188 [1887].

CROWN CASE RESERVED.

CASE reserved by the Quarter Sessions for the County of Gloucester as follows: —

Prisoners Hands and Phelps were severally indicted for that on the 29th day of November, 1886, they did feloniously steal, take, and carry away one cigarette, of the goods and chattels of Edward Shenton, against the peace of our said Lady the Queen.

Prisoner Jenner was indicted for an attempt to steal, etc.

Prisoners Jenner and Phelps pleaded guilty.

Prisoner Henry Hands pleaded not guilty and was given in charge to the jury.

This is a case of larceny from what is known as an automatic box," and the circumstances are as follows: —

Mr. Edward Shenton is the lessee of the Assembly Rooms at Cheltenham and has fixed against the wall of the passage leading from the High Street to the rooms an "automatic box."

This box presents the appearance of a cube of about eight or ten inches, and in the upper right-hand corner (facing the operator) of the front face there is a horizontal slit or opening of sufficient size to admit a penny piece.

In the centre of the face is a projecting button or knob about the size of a shilling.

In the lower left-hand corner is a horizontal slit or opening of sufficient size to allow of the exit of a cigarette.

There is an inscription on the face of the box: "Only pennies, not halfpennies."

Also: "To obtain an Egyptian Beauties cigarette place a penny in the box and push the knob as far as it will go."

If these directions are followed a cigarette will be ejected from the lower slit on to a bracket placed to receive it.

The box is the property of the Automatic Box Company. The cigarettes with which it was charged belonged to Mr. Shenton.

For some time past Mr. Shenton has found on clearing the box, which he did once or twice a day, that a large number of metal disks (brass and lead) of the size and shape of a penny had been put in and a corresponding number of cigarettes had been taken out.

In consequence of this discovery a watch was set upon the box, and upon the day named in the indictment, the box having been previously cleared, two gentlemen were seen to go to it; each put something in and each took a cigarette as it appeared.

The box was then examined and found to contain one English penny and one French penny. These coins were left in. The box was locked and the watch was again set.

Shortly after this, three lads (afterwards proved to be the three prisoners) were seen to come to the entrance of the passage. One of them came in, went to the box, put something in, obtained a cigarette, and then rejoined the other two at the entrance. This was repeated a second time. The third time it was observed that the box would not work, and while the lad, who afterwards was found to be the prisoner Jenner, was pushing at the knob the watchman came from his place of concealment and put his hand upon him.

The box was then opened and a piece of lead was discovered stuck in the "valve," which had the effect of preventing the machinery of the box from working.

It was then found that the box contained (besides the English and French pennies already mentioned) two disks of brass about the size and shape of a penny.

No other coin or metal piece was found in the box and no one (but the three lads as above mentioned) had approached it after the two gentlemen who had put in the English and French pennies.

The prisoner Jenner was given in charge to the police and the two other prisoners were subsequently apprehended.

Upon being brought together at the police station the prisoners all made statements more or less implicating themselves and each other.

The prisoner Hands said: Me and Jenner met Phelps about 7.45 P. M. Phelps said: "I want to go to Dodwells." I did not go and we went down into the High Street. Phelps and Jenner stopped by the Assembly Rooms and went in; I remained outside. I believe Jenner was caught at the box. Mr. Shenton's man took him inside. I afterwards put a penny in the box and had a cigarette myself. The pieces of brass produced are cut in our shop, the blacksmith's shop at Mr. Marshall's.

In leaving the case to the jury the learned chairman told them that they would have to consider: First, was there a theft committed; that is, was Mr. Shenton unlawfully deprived of his property without his knowledge or consent? Secondly, if that were so, were they satisfied that the prisoner (Hands) took any part in the robbery? He also told them that if they thought that the prisoner was one of the three lads who came to the entrance of the passage and that he was there with the others for the common purpose of unlawfully taking the cigarettes from the box; or that he afterwards partook of the proceeds of the robbery; or that he had taken a part in making the disks, knowing for what purpose they were to be used, that they would be justified in finding him guilty although he might not actually have put the disks into the box or have taken out a cigarette.

The jury found the prisoner (Hands) guilty, and upon motion in arrest of judgment on the ground that "the facts as disclosed by the evidence were not sufficient to constitute a larceny," all the prisoners were allowed to stand out on bail until the next Quarter Sessions.

The question for the Court was whether the facts as disclosed by the evidence were sufficient to constitute a larceny.

Lord Coleridge, C. J. In this case a person was indicted for committing a larceny from what is known as an "automatic box," which was so constructed that if you put a penny into it and pushed a knob in accordance with the directions on the box a cigarette was ejected on to a bracket and presented to the giver of the penny. Under these circumstances there is no doubt that the prisoners put in the box a

piece of metal which was of no value but which produced the same effect as the placing a penny in the box produced. A cigarette was ejected, which the prisoners appropriated; and in a case of that class it appears to me there clearly was larceny. The means by which the cigarette was made to come out of the box were fraudulent and the cigarette so made to come out was appropriated. It is perhaps as well to say that the learned chairman somewhat improperly left the question to the jury. He told them that if they thought that the prisoner Hands was one of the three lads who came to the entrance of the passage and that he was there with the others for the common purpose of unlawfully taking the cigarettes from the box, or that he afterwards partook of the proceeds of the robbery, they would be justified in finding him guilty, — he did not say larceneously or feloniously; and he further directed them that if they thought the prisoner had taken a part in making the disks, knowing for what purpose they were to be used, they would be justified in finding him guilty although he might not actually have put the disks into the box or have taken out a cigarette. Now I am not quite sure that simply the fact of doing an unlawful thing, as joining in the manufacture of a disk that some one else was to use, would make him guilty of larceny. He might be guilty of something else but I doubt very much whether he could be convicted of larceny. As upon the facts of the case, however, I do not think that the jury could have been misled; and as upon the facts there was undoubtedly a larceny committed, I am not disposed to set aside the conviction.

POLLOCK, B., STEPHEN, MATHEW, and WILLS, JJ., concurred.

Conviction affirmed.

CHAPTER XXXIV.

LARCENY WITH AGGRAVATION.

SECTION 1. LARCENY FROM THE PERSON.

REGINA *v.* SELWAY,

8 Cox C. C. 235 [1859].

THE prisoners were indicted for robbery and stealing from the person. The evidence showed that the prosecutor, who was paralyzed, received, while sitting on a sofa, in a room at the back of his shop, a

violent blow on the head from one of the prisoners, while the other went to a cupboard in the same room, and stole therefrom a cash box, with which he made off.

Orridge, for the prisoners, submitted that on this evidence there was no proof of a stealing from the person. The cash box at the time it was stolen was at some distance from the place where the prosecutor was sitting, and could not be said, therefore, to be about his person.

Robinson, for the prosecution, contended that it was quite sufficient for the purposes of the indictment to show that the cash box was under the protection of the prosecutor; it need not be in his bodily possession. He was near enough to it to protect it, at least by raising an alarm. It was laid down in 1 Hale P. C. 533, "If a thief put a man in fear, and then in his presence drive away his cattle, it is a robbery. So, if a man being assaulted by a robber throw his purse into a bush, or flying from a robber, let fall his hat, and the robber in his presence take up the purse or hat and carry it away, this would be robbery."

The COMMON SERGEANT, having consulted Mr. Justice Crowder and Mr. Baron Channell, held that although the cash box was not taken from the prosecutor's person, yet it being in the room in which he was sitting, he being aware of that fact, it was virtually under the protection of his person. He should under the circumstances leave this question to the jury: Was the cash box under the protection of the prosecutor's person at the time when it was stolen?

The jury found that it was. *Guilty.*

SECTION 2. LARCENY FROM A BUILDING.

REX v. CAMPBELL,

2 LEACH C. C. 642 [1792].

AT the Old Bailey in January Session, 1792, the prisoner was tried before Sir James Eyre, Knt., Lord Chief Baron, present Mr. Justice Buller and Mr. Justice Wilson, on an indictment charging "that James Campbell, late of the parish of St. Martin in the Fields, in the county of Middlesex, laborer; alias John Campbell, late of the same, laborer; alias James Pitt, late of the same, laborer; alias John Douglas, late of the same, laborer, on the 6th day of May, in the twenty-ninth year of the reign of George the Third, King of Great Britain, etc., with force and arms, at the parish aforesaid, in the county aforesaid, in the dwelling-house of Charlotte Margaretta Adams, widow, there situate, feloniously did steal, take, and carry away one prom-

issory note, called a bank note, of the value of twenty-five pounds (the said note at the time of committing the felony aforesaid being the property of the said Charlotte Margaretta Adams, the said sum of twenty-five pounds payable and secured by the said note being then due and unsatisfied to the said Charlotte Margaretta Adams, the proprietor thereof), against the statute, etc., and against the peace," etc.

It appeared in evidence that the prosecutrix, Mrs. Adams, kept a common lodging-house in Buckingham Street, in York Buildings. In the month of May, 1789, the prisoner, in the name of Major or Colonel Campbell, hired Mrs. Adams's first floor, and insinuated himself into her confidence and good opinion by telling her that he was well acquainted with her family, particularly with her brother, a young gentleman then in his Majesty's service at Gibraltar. On the morning of the ensuing day the overseer of the parish called on Mrs. Adams for the payment of certain taxes, and she took the bank note[1] of twenty-five pounds, as described in the indictment, from her pocket, and gave it to the overseer to change; but he not having sufficient cash for that purpose, she gave it to her servant, Ann Morgan, who, by Mrs. Adams's desire, took it to the prisoner in the first floor, with her mistress's compliments, requesting that he would give her change for it. The prisoner took out his purse, and examining its contents, told her that he had not gold enough about him for the purpose, but that he would go immediately to his banker's and get it changed; and he accordingly left the house with the bank note in his hand, but never returned. Mrs. Adams, soon afterwards suspecting the prisoner's integrity, gave information of the circumstances at Bow Street; but he was not apprehended until the month of January, 1791.

The statute 12 Anne, c. 7, entitled "An Act for the more effectual preventing and punishing robberies that shall be committed in dwelling-houses," recites "that divers wicked and ill-disposed servants, and other persons, are encouraged to commit robberies in houses by the privilege, as the law now is, of demanding the benefit of their clergy;" and enacts "that all and every person or persons that shall feloniously steal any money, goods or chattels, wares or merchandises, of the value of forty shillings or more, being in any dwelling-house, or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offender, and although the owner of such goods, or any other person or persons be or be not in such house or outhouse, or shall assist or aid any person or persons to commit any such offence, shall be absolutely debarred of the benefit of clergy."

[1] See Rex *v.* William Dean, July session, 1795, that bank notes are money within the meaning of 12 Anne, c. 7.

A question arose whether, under the circumstances of this case, the prisoner was debarred by the above statute of the benefit of clergy, the statute having been made to protect such property as might be deposited in the house, and not that which was on the person of the party.

The jury found the prisoner guilty, and the case was saved for the opinion of the judges.

The JUDGES were of opinion that it was not a capital offence within the 12 Anne, c. 7, and the prisoner was sentenced to be transported for seven years.

REX *v.* TAYLOR,

Russ. & Ry. 418 [1820].

THE prisoner was tried and convicted before Mr. Justice Park, in the year 1820, of stealing a watch in the dwelling-house of John Wakefield, to the value of forty shillings.

The prisoner lodged in the house of John Wakefield, and the prosecutor, who was an old acquaintance of the prisoner, and who could not get a bed in the public-house where they met, accepted an invitation to take part of the prisoner's bed. They went home together, and neither John Wakefield nor any of his family knew of the prosecutor's being there; so that he was the guest of the prisoner. The prisoner stole the prosecutor's watch from the bed-head.

It having been held that the statute 12 Anne, Stat. 1, c. 7, does not extend to a man stealing in his own house, the learned judge doubted whether the prisoner was not to be considered as the owner of the house with respect to the prosecutor. The statute was made for the protection of property deposited in the house, and not on the person of the party; and the prosecutor was neither the occupier nor a settled inhabitant of the house in which the watch was taken. The learned judge respited the judgment to take the opinion of the judges on this conviction.

In Easter term, 1820, ten of the judges met and considered this case. The majority, namely, BURROUGH, J., HOLROYD, J., WOOD, B., BAYLEY, J., GRAHAM, B., RICHARDS, C. B., and ABBOTT, Lord C. J., held the conviction right. RICHARDSON, J., BEST, J., and GARROW, B., *contra.*

REGINA *v.* BOWDEN,

2 Moody C. C. 285 [1843].

The prisoner was tried before Mr. Baron Alderson at the spring Assizes for the County of Derby, in the year 1843. The indictment charged him with stealing at the parish of Glossop, on the 5th of April, in the dwelling-house of him the said James Bowden there situate, various chattels above the value of £5, the property of Harris Seagall.

The case was fully proved, but as it was a case for transportation, and as the learned judge entertained a doubt whether the offence charged amounted to that of stealing to the value of £5 within a dwelling-house (the dwelling-house in the indictment being that of the prisoner himself), in which case the minimum punishment was transportation for ten years, or only to a charge of simple larceny, in which case the maximum was transportation for seven years, the learned judge respited the judgment, reserving the question for the opinion of the judges, that they might determine which of the two sentences would be legal.

This case was considered at a meeting of the Judges in Easter term, 1843, and they all thought the conviction for the whole offence right.

REX *v.* GOULD,[1]

Leach C. C. 257 [1780].

At the Old Bailey in January Session, 1780, Anne, the wife of John Gould, was tried before Nares, Justice, present Skinner, Chief Baron, Ashhurst, Justice, and Adair, Recorder, on an indictment charging the prisoner with having stolen "one leathern purse containing six guineas, etc.," the property of William Herring, in the dwelling-house of the said John Gould.

This indictment was framed on the statute of 12 Anne, c. 7, which enacts "that every person that shall feloniously steal any money, goods, etc., of the value of forty shillings, being in any dwelling-house or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offender, and although the owner of such goods, or any other person, be or be not in such house, etc., shall be absolutely debarred of clergy."

[1] [See Rex *v.* March, 1 Moody C. C. 182; Commonwealth *v.* Hartwell, 3 Gray, 450.]

The JUDGES present were clearly of opinion, in which Mr. Justice Gould afterwards concurred, that the prisoner could not be convicted of the capital part of the indictment, inasmuch as the felony was committed in the dwelling-house of her husband, which must be construed to be her house also, and it is apparent that the legislature intended that the stealing must be in the house of another person, to oust the offender of clergy.

CHAPTER XXXV.

STATUTORY OFFENCES SUPPLEMENTARY TO LARCENY.[1]

CERTAIN GENERAL PRINCIPLES OF CONSTRUCTION.

REGINA v. ROBINSON,

BELL C. C. 34.

TAYLOR v. NEWMAN,

9 Cox C. C. 314 [1863].

THIS was a case stated by justices at petty sessions upon a conviction under section 23 of the 24 & 25 Vict. c. 96 (the Larceny Consolidation Act), for unlawfully killing a pigeon.

By the above section it is enacted: "Whosoever shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay over and above the value of the bird any sum not exceeding £2."

The facts of the case were these. A number of house pigeons belonging to a Mr. Lloyd were kept for him at or near the house of one Thomas Newman, his gamekeeper, the respondent.

The appellant is a farmer, whose land is very near the house of the respondent, and the pigeons in question were in the habit in the day

[1] E. g., taking from realty; the various forms of embezzlement; cheating by false pretences; wrongful assuming of custody or of a temporary possession; certain forms of malicious mischief, etc.

time of flying over and upon and feeding on appellant's lands. Appellant complained to the respondent of the injury he supposed to be done him by the pigeons, and on the 1st of January, 1863, he caused the notice hereinafter set forth to be served on Mr. Lloyd. On the 5th of February last appellant, with a loaded gun in his hand, went into one of his fields, where the said pigeons were feeding on the ground. Appellant fired at the pigeons and thereby caused them to rise. Appellant then fired at them a second time, and killed one of the pigeons, which he left dead on the ground. The value of the pigeon killed was said to be 2*s.* 6*d.*

The following is a copy of the notice served on Mr. Lloyd above mentioned: —

HASTINGS, 1*st January*, 1863.

SIR, — Mr. Stephen Taylor, of Merriments Farm, Solehurst, has complained to us of the serious injury and annoyance he has sustained, and still continues to suffer, by reason of your pigeons being allowed to feed on his land, and he states he has in vain complained to you through your keeper about the matter, and he has now instructed us to inform you that he shall hold you responsible for all damages he may sustain in consequence; and we have to request that you will immediately cause them either to be destroyed, or prevent them doing further injury to Mr. Taylor's crops; if not, although Mr. Taylor will very much regret to do any act which may be considered at all unneighborly, he will be compelled in self-defence to shoot or otherwise destroy such pigeons, besides claiming damages against you as above stated; and you will be pleased to take this as notice of such his intention. We are, etc.,

J. G. LANGHAM & SON.

On these facts it was contended by the appellant's attorney that the killing of the pigeon under the circumstances above stated was not an "unlawful killing," and therefore did not render appellant liable to the penalty imposed by the 23d section of 24 & 25 Vict. c. 96, because after giving the above-mentioned notice, and the pigeons being still permitted to come upon his land, the appellant was justified by law in killing the said pigeons.

. . . . . .

BLACKBURN, J. I confess that I have entertained some little doubt upon the subject, but I think that upon a proper construction of the statute the appellant ought not to be convicted. The section in question is found in a statute "to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences;" and as far as this provision goes it is a re-enactment of a section in the previous Act of the 7 & 8 Geo. IV. c. 29, and the preamble recites that "it is expedient to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences;" and this

leads to the inference that the offences contemplated by the statute are those *ejusdem generis* with larceny. Now the section as to pigeons follows immediately after that applicable to dogs and some other animals, and it imposes a penalty for unlawfully and wilfully killing, wounding, or taking any house-dove or pigeon under such circumstances as shall not amount to larceny at common law. Now, what is the kind of unlawful killing here referred to? There has been at times considerable difficulty in knowing whether the taking of pigeons under certain circumstances, as where they are not taken from the pigeon-house, amounts to larceny; and it was to meet such cases that the section was framed. I think in this case that the farmer, who was protecting his crops, and who really thought he was doing a lawful act, cannot be said to have unlawfully killed the bird. The section must be taken in connection with the rest of the statute which applies to larceny; and, therefore, although I have entertained some doubts upon the subject, I think that the justices were wrong.

. . . . . .

Conviction quashed.

CHAPTER XXXVI.

EMBEZZLEMENT.

RE CLAPTON,

3 Cox C. C. 126 [1848].

THE prisoner was indicted for embezzlement. The prosecutor stated that the accused was in his employ; that the nature of his employment had been inserted in a memorandum prior to his giving a bond; that the memorandum was signed by both parties, and that the prisoner took it away with him.

No notice to produce the memorandum had been given.

Ballantine, for the prisoner, contended that it was not competent for the prosecution to give evidence of the nature of the service without producing the agreement or proving that notice to produce it had been given.

Parry, for the prosecution, submitted that he was not bound to produce the agreement; the terms of it were quite immaterial to the present issue. The simple question was, whether the prisoner had been

servant, and not what were his duties as such. The one was a mere matter of fact, namely, What had been done? The other was, What was agreed to be done?

Ballantine replied.

PATTESON, J. To substantiate this charge, it is essential that the money should have been received by the prisoner by virtue of his employment. It appears there has been an agreement between these parties, in which the prisoner's duty was defined; and if so, he received this money by virtue of an employment, the nature of which is contained in a written instrument. That instrument ought to be produced, or notice to produce it should have been given. There is nothing to take the case out of the general rule that you cannot give parol evidence of the contents of any written agreement, otherwise we should fall into that great difficulty,— the fallacy of human recollection. I remember two or three unreported cases tried at Warwick — one before Mr. Justice Coleridge — in which it was held that under such circumstances the agreement must be produced.

REGINA *v.* BARNES,

8 Cox C. C. 129 [1858].

PRISONER was indicted for that he being the servant of Joseph Hill and others, did embezzle two sums of £68 10*s.*, and £29 9*s.* 7*d.*, their property.

It was proved that prisoner, who was a coal and timber merchant, fell into difficulties, and made an assignment of all his goods, effects, and book debts. After the execution of this assignment, he received the two sums of money in question, which had been debts previously due to him, and he had not accounted for the receipt of those sums. After the execution of the deed the prisoner had been employed by the trustees, at a salary, to conduct the business for the benefit of the trustees.

. . . . . .

BYLES, J., said the difficulty was to make out that, in point of law, the prisoner was a clerk, or servant, or acting in the capacity of a servant within the meaning of the statute. It was clear that these debts were not assignable in law; they were *choses in action*, and the deed would only bind him in equity. The moment he received these moneys, they were his own moneys; he received what, in point of law, was his own money. How then, could he be guilty of embezzlement; or how could he be said to be clerk or servant to the trustees? He could not,

in point of law, pass the property in the debts due to him before the deed was executed. His assignees were only equitable assignees; they could only sue in his name. The deed could only pass that which he actually had in his possession at the time the deed was executed. Under these circumstances the indictment could not be sustained.

The prisoner was, therefore, *acquitted.*

. . . . . .

REX *v.* SULLENS,

1 Moody C. C. 129 [1826].

The prisoner was tried before Alexander, C. B., at the spring Assizes for the County of Essex, in the year 1826, on an indictment at common law, the first count of which charged the prisoner with stealing at Doddinghurst, on the 25th September, 1825, one promissory note, value £5, the property of Thomas Nevill and George Nevill, his master; the second count with stealing silver coin, the property of Thomas Nevill and George Nevill.

It appeared in evidence that Thomas Nevill, the prisoner's master, gave him a £5 country note, to get change, on the said 25th of September; that he got change, all in silver, and on his obtaining the change he said it was for his master, and that his master sent him. The prisoner never returned.

The jury found the prisoner not guilty on the first count, but guilty on the second count.

The question reserved for the consideration of the judges was, whether the conviction was proper, or whether the indictment should not have been on the statute 39 Geo. III. c. 85, for embezzlement.

In Easter term, 1826, the Judges met and considered this case, and held that the conviction was wrong, because as the masters never had possession of the change, except by the hands of the prisoner, he was only amenable under the statute 39 Geo. III. c. 85.

REGINA *v.* MASTERS,

3 Cox C. C. 178 [1848].

CROWN CASE RESERVED.

[Indictment for embezzlement.]

. . . . . .

It appeared in evidence that the course of business adopted by the house was for the customers to pay moneys into the hands of certain

persons who paid them over to a superintendent; he accounted with the prisoner and paid over such moneys to him, and the prisoner in his turn accounted with cashiers and paid over the moneys to them, he having no other duty to perform with respect to such moneys than to keep an account which might act as a check on the superintendent and the cashiers, these accounts being in like manner checks on him. These four parties to the receipt of the moneys are all the servants of the prosecutor.

With respect to the three sums in question it was proved that they passed in due course from the customers through the hands of the immediate receivers and the superintendent to the prisoner, who wilfully and fraudulently retained them.

On behalf of the prisoner it was objected on the authority of Rex *v.* Murray, 1 Moody's C. C. 276, that the moneys having, before they reached the prisoner, been in the possession of the prosecutor's servants, did in law pass to the prisoner from his master, and that consequently the charge of embezzlement could not be sustained. For the Crown it was answered that the prisoner having intercepted the moneys in their appointed course of progress to the master, this case was not governed by that of Rex *v.* Murray. There the prior possession of the master having been as complete as it was intended to be, the money might reasonably be considered as passing from the master to the prisoner, whereas in the present case it was in course of passage through the prisoner to the master.

The recorder left the case to the jury, reserving the point.

. . . . . .

Pollock, C. B. We are all agreed that the conviction is right. This is not at all one with the case of Rex *v.* Murray, 1 Moody C. C. 276; 5 C. & P. 145, where the prisoner had received money from another clerk on behalf of the master that he might employ it for a particular purpose. That case was held not to be within the statute because the master had had possession of the money by the hands of another clerk; but in this case I quite adopt the expression of the learned recorder, that the money was in course of progress or on its way to the master. It appears that the course of business was this, — that the money is originally received by one servant whose duty it is to hand it to another, and that so it is handed from one person to another until it gradually reaches the hands of the cashier. The prisoner was one of those into whose hands it came in the course of transit; he received and embezzled it; and it seems to me the conviction is right.

Patteson, J. I entirely concur in the opinion expressed by the Lord Chief Baron. Rex *v.* Murray was quite a different case. There there was in truth a delivery by the master to another person and by him to

the prisoner who received the money, not on account of the master but to pay to a third person. Here it was clearly received on account of the master. As to the other point the jurisdiction is as plain as it can be. . . .

Conviction affirmed.

REGINA *v.* HARRIS,

6 Cox C. C. 363 [1854].

COURT OF CRIMINAL APPEAL.

[Indictment for embezzlement.]

. . . . . .

HARRIS was the miller of a mill in the jail of the County of Worcester. It was the duty of the prisoner to direct any persons bringing grain to be ground at the mill to obtain at the porter's lodge at the jail a ticket specifying the quantity of grain brought. The ticket was his order for receiving the grain. It was the duty of the prisoner to receive the grain with the ticket, to grind the grain at the mill, to receive the money for the grinding from the person so bringing the grain with the ticket, and to account to the governor of the jail for the money so received. The governor accounted for the same to Sir Edmund Lechmere, the treasurer of the county rates. It was a breach of the prisoner's duty to receive or grind grain without such a ticket as above mentioned; but he had no right to grind any grain at the mill for his private benefit.

The prisoner was appointed to his situation by the magistrates of the County of Worcester, myself, and others, at a fixed weekly salary, which was paid to him out of the county rates by the governor of the jail, who received the money for the purpose from Sir Edmund Lechmere.

The moneys which the prisoner misappropriated he received from persons for grinding their grain at the mill; but none of these persons had obtained a ticket as above mentioned from the porter's lodge, nor had they been directed by the prisoner to obtain such tickets, nor was there in fact any ticket at all.

. . . . . .

POLLOCK, C. B. We are all of opinion that this conviction cannot be supported. The only point on which I am to pronounce the unanimous opinion of the Court is this: That on the facts stated it appears that the defendant had no right on behalf of his master to grind any corn but

that which was brought with a ticket; and that the reasonable conclusion is that, as to all corn ground without a ticket, he intended to make an improper use of the machine and did use it on those occasions for his private benefit. The money therefore was not received on account of his master and he was not guilty of embezzlement.

Conviction quashed.

REGINA *v.* CULLUM,

L. R. 2 C. C. R. 28 [1873].

CASE stated by the Chairman of the West Kent Sessions.

The prisoner was indicted as servant to George Smeed for stealing £2, the property of his master.

The prisoner was employed by Mr. Smeed of Sittingbourne, Kent, as captain of one of Mr. Smeed's barges.

The prisoner's duty was to take the barge with the cargo to London and to receive back such return cargo and from such persons as his master should direct. The prisoner had no authority to select a return cargo or take any other cargoes but those appointed for him. The prisoner was entitled by way of remuneration for his services to half the earnings of the barge after deducting half his sailing expenses. Mr. Smeed paid the other half of such expenses. The prisoner's whole time was in Mr. Smeed's service. It was the duty of the prisoner to account to Mr. Smeed's manager on his return home after every voyage. In October last, by direction of Mr. Smeed, the prisoner took a load of bricks to London. In London he met Mr. Smeed and asked if he should not on his return take a load of manure to Mr. Pye of Caxton. Mr. Smeed expressly forbade his taking the manure to Mr. Pye and directed him to return with his barge empty to Burham and thence take a cargo of mud to another place, Murston. Going from London to Murston he would pass Caxton. Notwithstanding this prohibition the prisoner took a barge-load of manure from London down to Mr. Pye at Caxton, and received from Mr. Pye's men £4 as the freight. It was not proved that he professed to carry the manure or to receive the freight for his master. The servant who paid the £4 said that he paid it to the prisoner for the carriage of the manure but that he did not know for whom. Early in December the prisoner returned home to Sittingbourne and proposed to give an account of his voyage to Mr. Smeed's manager. The prisoner stated that he had taken the bricks to London and had returned empty to Burham, as directed by Mr. Smeed, and that there he had loaded with mud for Murston.

In answer to the manager's inquiries the prisoner stated that he had not brought back any manure in the barge from London, and he never accounted for the £4 received from Mr. Pye for the freight for the manure.

The jury found the prisoner guilty as servant to Mr. Smeed of embezzling £2.

The question was whether, on the above facts, the prisoner could be properly convicted of embezzlement.[1]

E. T. Smith (with him *Moreton Smith*) for the prosecution. The prisoner received this freight either "for" or "on account of his master or employer," and therefore is within the terms of 24 & 25 Vict. c. 96, § 68. The words "by virtue of such employment," which were in the repealed statutes relating to the same offence, have been "advisedly omitted in order to enlarge the enactment and get rid of the decisions on the former enactments." Greaves' Crim. Law Consolidation Acts, p. 117.

[BOVILL, C. J. An alteration caused by the decision of Rex *v.* Snowley,[2] which was a case resembling the present one.

BLACKBURN, J. How can the money here be said to have been received into the possession of the servant so as to become the property of the master?]

The prisoner was exclusively employed by the prosecutor. With his master's barge he earned, and in the capacity of servant received, £4 as freight, which on receipt by him at once became the property of his master. Rex *v.* Hartley.[3]

[BLACKBURN, J. But in this case the servant was disobeying orders. Suppose a private coachman used his master's carriage without leave and earned half-a-crown by driving a stranger, would the money be received for the master so as to become the property of the latter?]

Such coachman has no authority to receive any money for his master; the prisoner, however, was entitled to take freight.

[BOVILL, C. J. He was expressly forbidden to do so on this occasion.]

Can it be said that he may be guilty of embezzlement if in obedience

[1] 24 & 25 Vict. c. 96, § 68, enacts that "Whosoever, being a clerk or servant or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed. . . ."

[2] 4 C. & P. 390.

[3] Russ. & Ry. 139.

of orders he receives money, and yet not guilty of that crime if he is acting contrary to his master's commands? See note to Regina *v.* Harris[1] in 2 Russell on Crimes, 4th ed., p. 453.

[Blackburn, J. In suggesting that case to be erroneous the editor seems to assume that the decision proceeded on the words "by virtue of his employment," whereas it did not.

Bramwell, B. Suppose the captain of a barge let his master's vessel as a stand to the spectators of a boat-race and took payment from them for the use of it?]

Such use would not be in the nature of his business.

[Blackburn, J. In the note to this section by Mr. Greaves he remarks: "Mr. Davis[2] rightly says that 'this omission avoids this technical distinction;' but he adds, 'still it must be the master's money which is received by the servant, and not money wrongfully received by the servant by means of false pretences.' This is plainly incorrect." But in my opinion Mr. Davis was plainly correct and Mr. Greaves wrong. Regina *v.* Thorpe.[3]]

Bovill, C. J. In the former Act relating to this offence were the words "by virtue of his employment." The phrase led to some difficulty; for example, such as arose in Regina *v.* Snowley[4] and Regina *v.* Harris.[5] Therefore in the present statute those words are left out, and § 68 requires instead that in order to constitute the crime of embezzlement by a clerk or servant the "chattel, money, or valuable security . . . shall be delivered to or received or taken into possession by him, for or in the name or on account of his master or employer."

Those words are essential to the definition of the crime of embezzlement under that section. The prisoner here, contrary to his master's orders, used the barge for his, the servant's, own purposes and so earned money which was paid to him, not for his master but for himself; and it is expressly stated that there was no proof that he professed to carry for the master, and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property and so earning money for himself and not for his master. Under those circumstances the money would not be received "for" or "in the name of" or "on account of" his master but for himself, in his own name, and for his own account. His act therefore does not come within the terms of the statute, and the conviction must be quashed.

[1] Dears. C. C. 344.
[2] Davis' Criminal Statutes, p. 70.
[3] Dears. & B. C. C. 562.
[4] 4 C. & P. 390.
[5] Dears. C. C. 344.

BRAMWELL, B. I am of the same opinion. I think in these cases we should look at the substance of the charge and not merely see whether the case is brought within the bare words of the Act of Parliament. Now the wrong committed by the prisoner was not fraudulent or wrongful with respect to money, but consisted in the improper use of his master's chattel. The offence is, as I pointed out during argument, only that which a barge-owner's servant might be guilty of, if when navigating the barge, he stopped it, allowed persons to stand upon it to view a passing boat-race, charged them for so doing, and pocketed the money they paid to him. There is no distinction between that case and this save that the supposititious case is more evidently out of the limits of the statute.

The use of this barge by the prisoner was a wrongful act yet not dishonest in the sense of stealing. But I will add that I do not think this case even within the words of the statute. The servant undoubtedly did not receive the money "for" his master nor "on account of" his master nor "in the name" of his master. Nevertheless I doubt extremely whether on some future day great difficulty may not arise as to the meaning of these expressions in § 68, for I doubt whether, although the servant had used his master's name, he would have been within the terms of the Act of Parliament. "In the name of" his master is a very curious expression. Suppose a person in service as a carter had also a horse and cart of his own and employed them to do some or other work, professing them to be his master's, and received hire for it "in the name of" his master, would that be embezzlement? Could he be rightly convicted under this section? I doubt it extremely. The words "in the name of" his master, although inserted with a desire to obviate difficulties, seem to me likely hereafter to raise them.

. . . . . .

REX v. HEADGE,

Russ. & Ry. 160 [1820].

THE prisoner was tried and convicted before Mr. Justice Bayley at the Old Bailey Sessions, September, 1809, on the statute 39 G. III. c. 85,[1] for embezzling three shillings, which he received for and on account of his masters, James Clarke and John Giles.

[1] Which enacts that if any servant or clerk or any person employed for the purpose in the capacity of a servant or clerk to any person whomsoever, shall, by virtue of such employment, receive or take into his possession any money, goods, etc., or effects, for or in the name or on the account of his master or employer, and shall

It appeared from the evidence that the prosecutors desired a neighbor, one Francis Moxon, to go to their shop and purchase some articles in order that they might discover whether the prisoner put the money which he received for the goods sold into the till; the prosecutors supplied Moxon with three shillings of their own money for this purpose, which money they marked. Moxon went to the shop, bought the articles, and paid the prisoner the three shillings. The prisoner embezzled this money.

It was urged on behalf of the prisoner that the prosecutors had constructively the possession of this money up to the time of the embezzlement and that they had parted with nothing but the mere custody. The prisoner it was contended might have been indicted for larceny at common law, but that the statute did not apply to cases where the money before its delivery to the servant had been in the master's possession and might legally be considered the masters' at the time of such delivery, as Moxon in this case was the masters' agent and his possession theirs.

The learned judge before whom this case was tried thought it deserved consideration and reserved the point for the opinion of the judges.

In Michaelmas term, 1809, the JUDGES met and held the conviction right, upon the authority of Bull's Case,[1] in which the judges upon similar facts held a common-law indictment could not be supported. It seemed to be the opinion of the judges that the statute did not apply to cases which are larceny at common law.[2]

REGINA *v.* BOWERS,

L. R. 1 C. C. R. 41 [1866].

COURT FOR CROWN CASES RESERVED.

THE following case was stated by the assistant judge of the Middlesex Sessions: —

Samuel Bowers was tried before me at the Sessions of the Peace for Middlesex, on the 10th of January, 1866, upon an indictment which

fraudulently embezzle, secrete, or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or employer, for whose use or in whose name or on whose account the same was or were delivered or taken into the possession of such servant or clerk or other person so employed, although such money, goods, etc., was or were so taken or received into the possession of his or their servant, clerk, or other person so employed.

[1] Cited in Bazeley's Case, 2 Leach C. C. 841; s. c. 2 East, P. C. *notis.*

[2] [So Regina *v.* Gill, 6 Cox C. C. 295 (1854).]

charged him with having feloniously embezzled several sums of money, the property of John Clark, by whom, it was alleged, he was employed as clerk and servant. The prisoner was employed by the prosecutor under an agreement dated May 9, 1864, of which the following is a copy: —

Memorandum of agreement made and entered into this 9th day of May, 1864, between Samuel Bowers of the one part, and Robert Skirrow, John Clark, and John Quick, coal owners and merchants, of the other part, witnesseth that the said Samuel Bowers hereby agrees to become, and the said Skirrow, Clark, and Quick agree to engage the said Samuel Bowers as their agent or traveller for the sale of coals, one guinea per week to be paid to the said Samuel Bowers as salary, and one shilling per ton to be paid as commission upon all coals sold by him when the prices realized are in accordance with the current prices delivered; any dealers he may be the means of securing as customers to the wharf, sixpence per ton to be paid for such services; two shillings and sixpence to be paid for cartage and delivery of coals. The said Samuel Bowers likewise agrees to collect all moneys in connection with his orders; but the said Skirrow, Clark, and Quick will not hold him responsible for any bad debts that may be contracted, but expect him to be as cautious as practicable in securing good and solvent customers: the beforementioned commission not to become due until the money has been received by the said Skirrow, Clark, and Quick. The said Samuel Bowers also agrees not to keep or retain in his possession moneys collected on behalf of the said Skirrow, Clark, and Quick more than one week from the date of receiving the same. The said Skirrow, Clark, and Quick agree to take the board and blinds now fitted up at the residence of the said Samuel Bowers at the cost price to him, on condition that they have free use, without charge, of that part of his residence now used as an office. It is mutually agreed that, should dissatisfaction arise on either side, a month's notice in writing must be given.

In June, 1865, the prisoner was desirous of selling coals by retail on his own account, and the prosecutor consented to supply him with coals for that purpose, but then made an alteration in the mode of remunerating him, which is specified in a letter, of which the following is a copy: —

London, June 3, 1865.

Mr. Samuel Bowers: Dear Sir, — As you are now going into the retail coal trade on your own account, we think it best to have a proper understanding; and in future we pay you a commission only, — your salary will be stopped from this date. We find a very large amount standing against you, and we particularly request you to do all you possibly can to get it in. The writer will wait upon you on Wednesday at the usual time, and hopes you will have a large amount of money ready. Yours truly,

Skirrow, Clark, & Quick.

The prisoner consented to the proposed alteration, and continued to obtain orders from various persons for coals, which were supplied by

the prosecutor, the invoices being made out in the name of the prosecutor's firm; and in the three instances charged in this indictment such invoices were produced by the customers, who proved payment of the several amounts in such invoices to the prisoner, whose receipt was attached to each invoice. The prisoner did not account to the prosecutor for either amount. The manner of accounting was for the prosecutor to call on the prisoner weekly, who then paid him a sum of money on account of what he had received; and once a month the prisoner attended at the prosecutor's office, when the names of the customers who had been supplied with coals were called over, and the prisoner stated whether they had paid, handing over in respect of the amounts he reported as having been paid the surplus beyond his weekly payments on account. He did not report that either of the sums in this indictment had been paid, but on the contrary represented them as still due after he had received the money. The coals supplied for the purpose of his retail trade were charged to him as to other customers; but this account was kept quite distinct from the account of the moneys received by the prisoner on the prosecutor's account.

The sums alleged to have been embezzled were not received by the prisoner until after the second agreement had been made; and at the prisoner's place of business a board was exhibited, describing him as agent to the prosecutor. It was contended that he was not a clerk or servant to the prosecutor within the meaning of the statute. I declined to stop the case, and the jury found the prisoner guilty.

The question for the opinion of the Court is, whether the prisoner, under the circumstances herein stated, was a clerk or servant to the prosecutor, so as to be liable to be convicted of the crime of embezzlement.

. . . . . .

Erle, C. J. We are all of opinion that this conviction must be quashed. The facts stated fall within the cases cited by Mr. Collins, which decide that a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money where and when he thinks proper, is not a clerk or servant within the meaning of the statute. The construction of the documents decides this case. Under the first agreement the prisoner was a servant; but under the second he was at liberty to dispose of his time in the way he thought best, and to get or to abstain from getting orders on any particular day as he might choose; and this state of things is inconsistent with the relation of master and servant.

Conviction quashed.

REGINA *v.* BAILEY,

12 Cox C. C. 56 [1871].

COURT OF CRIMINAL APPEAL.

CASE reserved for the decision of this Court.

The prisoner was tried before me at the Michaelmas Quarter Sessions of the Peace, holden by adjournment at Sheffield, in and for the West Riding of the County of York, on the 28th of November, 1870, upon an indictment which charged him with having feloniously embezzled several sums of money, the property of Joseph Hall and another, his masters.

The prosecutors, the said Joseph Hall and Charles Hazlehurst Greaves, who carried on business in partnership in Sheffield as brewers and wine and spirit dealers, under the firm of William Greaves & Company, employed the prisoner from 1861 to 1866 as traveller and bookkeeper, at a weekly wage of 15*s*. The prisoner then left the prosecutors' service and took other employment.

About three years after this the prisoner was again engaged by Messrs. Greaves & Company on a fresh agreement. The terms (which were not in writing) are stated in the evidence of Joseph Hall to have been as follows: —

The prisoner was employed as traveller to solicit orders for, and to collect the moneys due on the execution of such orders by, the firm, and to pay over to the said Joseph Hall, or to Charles Haslehurst Greaves, or to the clerk at the brewery in Sheffield, the total net amount of the moneys so collected by the prisoner on the evening of the day when such moneys were so received by him, or on the day following, in case the prisoner should then be travelling at a distance from the brewery. In case the prisoner had neither received money nor obtained orders, he was not expected to go to the brewery that day, but when he came there it was his duty to enter in the cash book of the firm the name and address of the customer from whom he had received any money, the amount, the date of the receipt, and the discount allowed (if any) to the customer, and to pay over to the firm the net amount of the money received by him, the discount being deducted. Every three months the prisoner had an account given to him of the various sums then owing by the customers to the firm, and it was the prisoner's duty to deliver these accounts and apply for payment from the customers on presenting them. In case such accounts were not paid, the firm enforced payment thereof. The prisoner had no authority

to retain in his hands moneys belonging to the firm. He had to travel in the town of Sheffield and neighborhood. His district comprised about six miles round Sheffield and included the town of Rotherham. He was to be exclusively in the employment of the firm, to whom he was to give the whole of his time,— the whole of every day. The prisoner had no salary, but was paid by a commission of five per cent. on all orders for goods he obtained for the firm, and an additional five per cent. on the amount of cash collected by him on payment by the customers for the goods supplied by the firm on such orders. The firm were to pay to the prisoner his commission every week, but this was not always done with regularity, and the prisoner was not always regular in his attendance at the brewery, and, although the firm complained of his irregularity, they did not discharge him.

It was further stated by Joseph Hall on cross-examination that the prisoner could get orders when and where he pleased within his district, and that he had to collect money as soon as he could, and as he chose. His duty was to go to both old and new customers of the firm, and to collect money when and where he thought proper; he was not bound by particular orders; he was at liberty to dispose of his time as he pleased, but he was to employ the whole of it in the service of the firm.

It was proved and admitted by the prisoner on the 21st of October that he had retained in his hands, and had not accounted for, several sums of money which he had received from the firm by virtue of the before-mentioned employment; the three sums charged in the indictment had been received by the prisoner on the 26th of May, the 1st of June, and 26th of August respectively.

During the course of the case the counsel for the prisoner called my attention to Regina *v.* Bowers, L. Rep. 1 C. C. R. 45; 10 Cox C. C. 250, and at the close of the case for the prosecution it was contended that the prisoner was not a clerk or servant to the prosecutors within the meaning of the Stat. 24 & 25 Vict. c. 96.

I declined to stop the case, and directed the jury to decide whether the prisoner had been proved by the evidence of Joseph Hall to be a servant to the prosecutors or not.

The jury found the prisoner guilty, judgment being respited until the opinion of the Court of Criminal Appeal is pronounced upon the above objection, and defendant is on bail.

The question for the opinion of this Honorable Court is, whether the prisoner, under the circumstances herein stated, was a clerk or servant to the prosecutors, so as to be liable to be convicted of the crime of embezzlement.

WALTER SPENCER STANHOPE, Chairman.

Forbes, for the prosecution. The conviction was right. This case is distinguishable from Regina *v.* Bowers, where the prisoner was paid by commission and was at liberty to get orders or not, as he pleased, for in the present case the prisoner was bound to devote the whole of his time to the prosecutors' service. In Regina *v.* Turner (11 Cox C. C. 551) it was held by Lush, J., that a traveller who was bound to "diligently employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the prosecutor, and who was not without the prosecutor's written consent to take or execute any order for vending or disposing of similar goods to the prosecutors for or on account of himself or any other person, and who was to be paid by commission, and to render weekly accounts," was a clerk or servant within the 24 & 25 Vict. c. 96, § 68. [BRAMWELL, B. The effect of the agreement here is that the prisoner was not to be told how he was to work, but still he was to work. BLACKBURN, J. He was a servant to do this kind of work, but might use his own discretion as to the way of doing it.] In Bowers's case it was optional with the prisoner whether he got any orders at all. [BOVILL, C. J., referred to Regina *v.* Tite, L. & C. 13; 8 Cox C. C. 458. A traveller paid by commission and employed to get orders and to receive payments was held to be a clerk or servant, although he was at liberty to receive orders for other persons also. In this case the prisoner was bound to devote the whole of his time to the prosecutors.]

BOVILL, C. J. The evidence in this case clearly showed that the prisoner was a clerk or servant within the statute. There is nothing in the evidence inconsistent with that relation. Regina *v.* Tite conclusively shows that the prisoner was a clerk or servant. The conviction will be affirmed.

The rest of the Court concurred. *Conviction affirmed.*

COMMONWEALTH *v.* HAYS,

14 GRAY, 62 [1858].

INDICTMENT on St. 1857, c. 233.[1] The indictment contained two counts, one for embezzlement, and one for simple larceny.

At the trial, . . . Amos Stone . . . testified as follows: "I am treasurer of the Charlestown Five Cent Savings Bank. . . . The defendant came into

[1] ["If any person, to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered, shall embezzle or fraudulently convert to his own use, or shall secrete with intent to embezzle or fraudulently convert to his own use, such money, goods, or property, or any part thereof, he shall be deemed, by so doing, to have committed the crime of simple larceny."]

the bank, and asked to draw his deposit. . . . I took his book, balanced it, and handed it back to him. It was for one hundred and thirty dollars in one item. I then counted out to him two hundred and thirty dollars, and said, 'There are two hundred and thirty dollars.' The defendant took the money to the end of the counter and counted it, and then left the room. Soon after the defendant had left, I discovered that I had paid him one hundred dollars too much. After the close of bank hours I went in search of the defendant, and told him that I had paid him one hundred dollars too much, and asked him to adjust the matter. . . . I said to him, 'I can prove that you got two hundred and thirty dollars.' He replied . . . 'If you can prove it, you will get it; otherwise, you won't.' I intended to pay the defendant the sum of two hundred and thirty dollars, and did so pay him. I then supposed that the book called for two hundred and thirty dollars. . . .

The defendant asked the Court to instruct the jury that the above facts did not establish such a delivery or embezzlement as subjected the defendant to a prosecution under the St. of 1857, c. 233, and did not constitute the crime of larceny.

The Court refused so to instruct the jury, and instructed them "that if the sum of two hundred and thirty dollars was so delivered to the defendant, as testified, and one hundred dollars, parcel of the same, was so delivered by mistake of the treasurer, as testified, and the defendant knew that it was so delivered by mistake, and knew he was not entitled to it, and afterwards the money so delivered by mistake was demanded of him by the treasurer, and the defendant, having such knowledge, did fraudulently, and with a felonious intent to deprive the bank of the money, convert the same to his own use, he would be liable under this indictment." The jury returned a verdict of guilty, and the defendant alleged exceptions.

Bigelow, J. The statute under which this indictment is found is certainly expressed in very general terms, which leave room for doubt as to its true construction. But interpreting its language according to the subject-matter to which it relates, and in the light of the existing state of the law, which the statute was intended to alter and enlarge, we think its true meaning can be readily ascertained.

The statutes relating to embezzlement, both in this country and in England, had their origin in a design to supply a defect which was found to exist in the criminal law. By reason of nice and subtle distinctions which the courts of law had recognized and sanctioned, it was difficult to reach and punish the fraudulent taking and appropriation of money and chattels by persons exercising certain trades and occupations, by virtue of which they held a relation of confidence or trust toward their employers or principals, and thereby became pos-

sessed of their property. In such cases the moral guilt was the same as if the offender had been guilty of an actual felonious taking; but in many cases he could not be convicted of larceny, because the property which had been fraudulently converted was lawfully in his possession by virtue of his employment, and there was not that technical taking or asportation which is essential to the proof of the crime of larceny. The King *v.* Bazeley, 2 Leach (4th ed.), 835; 2 East P. C. 568.

The statutes relating to embezzlement were intended to embrace this class of offences; and it may be said generally that they do not apply to cases where the element of a breach of trust or confidence in the fraudulent conversion of money or chattels is not shown to exist. This is the distinguishing feature of the provisions in the Rev. Sts. c. 126, §§ 27–30, creating and punishing the crime of embezzlement, which carefully enumerate the classes of persons that may be subject to the penalties therein provided. Those provisions have been strictly construed, and the operation of the statute has been carefully confined to persons having in their possession, by virtue of their occupation or employment, the money or property of another, which has been fraudulently converted in violation of a trust reposed in them. Commonwealth *v.* Stearns, 2 Met. 343; Commonwealth *v.* Libbey, 11 Met. 64; Commonwealth *v.* Williams, 3 Gray, 461. In the last named case it was held, that a person was not guilty of embezzlement, under Rev. Sts. c. 126, § 30, who had converted to his own use money which had been delivered to him by another for safe keeping.

The St. of 1857, c. 233, was probably enacted to supply the defect which was shown to exist in the criminal law by this decision, and was intended to embrace cases where property had been designedly delivered to a person as a bailee or keeper, and had been fraudulently converted by him. But in this class of cases there exists the element of a trust or confidence reposed in a person by reason of the delivery of property to him, which he voluntarily takes for safe keeping, and which trust or confidence he has violated by the wrongful conversion of the property. Beyond this the statute was not intended to go. Where money paid or property delivered through mistake has been misappropriated or converted by the party receiving it, there is no breach of a trust or violation of a confidence intentionally reposed by one party and voluntarily assumed by the other. The moral turpitude is therefore not so great as in those cases usually comprehended within the offence of embezzlement, and we cannot think that the legislature intended to place them on the same footing. We are therefore of opinion that the facts proved in this case did not bring it within the statute, and that the defendant was wrongly convicted.

Exceptions sustained.

CHAPTER XXXVII.

Cheating by False Pretences.[1]

Section 1. Obtaining of Title: Inoperative Intent to Pass Title.

REX *v.* ADAMS,

Russ. & Ry. 225 [1812].

The prisoner was tried before Mr. Justice Chambre, at the Lent Assizes held at Taunton, in the year 1812, for a grand larceny in stealing a hat, stated in one count to be the property of Robert Beer and in another count to be the property of John Paul.

The substance of the evidence was, that the prisoner bought a hat of Robert Beer, a hat maker at Ilminster. That on the 18th of January he called for it, and was told it would be got ready for him in half an hour, but he could not have it without paying for it.

While he remained with Beer, Beer showed him a hat which he had made for one John Paul; the prisoner said he lived next door to him, and asked when Paul was to come for his hat, and was told he was to come that afternoon in half an hour or an hour. He then went away, saying he would send his brother's wife for his own hat.

Soon after he went he met a boy to whom he was not known. The prisoner asked the boy if he was going to Ilminster, and being told that he was going thither, he asked him if he knew Robert Beer there, telling him that John Paul had sent him to Beer's for his hat, but added that as he the prisoner owed Beer for a hat which he had not money to pay for, he did not like to go himself, and therefore desired the boy (promising him something for his trouble) to take the message from Paul and bring Paul's hat to him the prisoner; he also told him that Paul himself, whom he described by his person and a peculiarity of dress, might perhaps be at Beer's, and if he was the boy was not to go in.

The prisoner accompanied him part of the way, and then the boy proceeded to Beer's, where he delivered his message and received the

[1] [As to cheats at common law, see Commonwealth *v.* Warren, above, p. 11; Rex *v.* Bryan, 2 Strange 866; Rex *v.* Lara, 2 Leach C. C. 652; Regina *v.* Closs, Dears. & B. 460; 7 Cox C. C. 494; Roscoe Crim. Evid., "Cheating."]

hat, and after carrying it part of the way for the prisoner by his desire, the prisoner received it from him, saying he would take it himself to Paul.

The fraud was discovered on Paul's calling for his hat at Beer's, about half an hour after the boy had left the place; and the prisoner was found with the hat in his possession and apprehended.

From these and other circumstances, the falsity of the prisoner's representation and his fraudulent purpose were sufficiently established; but it was objected on the part of the prisoner that the offence was not larceny, and that the indictment should have been upon the statute for obtaining goods by false pretences.

The prisoner was convicted, but the learned judge forbore to pass sentence, reserving the question for the opinion of the judges.

In Easter term, 25th of April, 1812, all the JUDGES were present (except LORD ELLENBOROUGH, MANSFIELD, C. J., and LAWRENCE, J.), when they held that the conviction was wrong; that it was not larceny, but obtaining goods under a false pretence.[1]

SECTION 2. OBTAINING OF TITLE: NOT MERE CUSTODY.

REGINA v. KILHAM,

L. R. 1 C. C. R. 261 [1870].

CROWN CASE RESERVED.

CASE stated by the Recorder of York.

Indictment under 24 & 25 Vict. c. 96, § 88, for obtaining goods by false pretences.

The prisoner was tried at the last Easter Quarter Sessions for York. The prisoner, on the 19th of March last, called at the livery stables of Messrs. Thackray, who let out horses for hire, and stated that he was sent by a Mr. Gibson Hartley to order a horse to be ready the next morning for the use of a son of Mr. Gibson Hartley, who was a customer of the Messrs. Thackray. Accordingly, the next morning the prisoner called for the horse, which was delivered to him by the hostler. The prisoner was seen, in the course of the same day, driving the horse, which he returned to Messrs. Thackray's stables in the evening. The hire for the horse, amounting to 7*s.*, was never paid by the prisoner.

[1] [For a case quite similar to Rex *v.* Adams, see Commonwealth *v.* Jeffries, 7 Allen, 548, in which the point of a lack of meeting of minds was not taken by the defence.]

The prisoner was found guilty.

The question was, whether the prisoner could properly be found guilty of obtaining a chattel by false pretences within the meaning of 24 & 25 Vict. c. 96, § 88.[1]

The case of Regina *v.* Boulton was relied on on the part of the prosecution.

The case was argued before Bovill, C. J., Willes, Byles, and Hannen, JJ., and Cleasby, B.

May 7. No counsel appeared for the prisoner.

. . . . . .

Bovill, C. J. We are of opinion that the conviction in this case cannot be supported. The Stat. 24 & 25 Vict. c. 96, § 88, enacts that, "whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of misdemeanor." The word "obtain" in this section does not mean obtain the loan of, but obtain the property in, any chattel, etc. This is, to some extent, indicated by the proviso, that if it be proved that the person indicted obtained the property in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted; but it is made more clear by referring to the earlier statute from which the language of § 88 is adopted. 7 & 8 Geo. IV. c. 29, § 53, recites that "a failure of justice frequently arises from the subtle distinction between 'larceny and fraud,'" and for remedy thereof enacts that "if any person shall, by any false pretence, obtain," etc. The subtle distinction which the statute was intended to remedy was this: That if a person by fraud induced another to part with the possession only of goods and converted them to his own use, this was larceny; while if he induced another by fraud to part with the property in the goods as well as the possession, this was not larceny.

But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us. In support of the conviction the case of Regina *v.* Boulton was referred to. There the prisoner was indicted for obtaining by false pretences a railway ticket with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the journey. The reasons for this decision do not very clearly appear, but it may be distinguished from the present case in this respect, — that the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use

[1] 24 & 25 Vict. c. 96, § 88, enacts that, "Whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor."

for the only purpose for which it was capable of being applied. In this case the prisoner never intended to deprive the prosecutor of the horse or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time. The conviction must therefore be quashed.

Conviction quashed.

REGINA *v.* BOULTON,

1 DEN. C. C. 508 [1849].

CROWN CASE RESERVED.

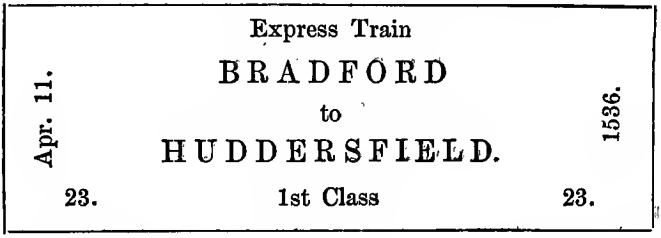
THE prisoner was convicted at the Yorkshire summer Assizes, 1849, before Mr. Justice Wightman, upon the sixth count of an indictment charging him with obtaining, by false pretences, from a servant of the Lancashire and Yorkshire Railway Company, a railway ticket of the company, for a journey from Bradford to Huddersfield, by one of their trains.

The count was as follows: —

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Boulton, afterwards, to wit, on the 11th day of April, in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to one Charles Turner, he the said Charles Turner being then and there a servant of the said Lancashire and Yorkshire Railway Company, that a certain ticket which he the said John Boulton then and there delivered to the said Charles Turner, was then and there a genuine ticket of the said company, before then obtained by him the said John Boulton from the said company, for the conveyance of him the said John Boulton, as a passenger, in and by certain carriages of the said company, from the said town of Bradford to Huddersfield aforesaid, on the said 11th day of April, by means of which last-mentioned false pretence the said John Boulton did then and there unlawfully obtain from the said Lancashire and Yorkshire Railway Company a certain chattel, to wit, a printed ticket of the said company, authorizing the bearer thereof to be thereafter conveyed, without further charge or payment in that behalf, by certain carriages of the said company, on the said 11th day of April, from the said town of Bradford to Huddersfield aforesaid, the said last-mentioned ticket being then and there the goods and chattels of the said Lancashire and Yorkshire Railway Company, and of the value of ———. with intent thereby then and there to cheat and defraud the said Lancashire and Yorkshire Railway Company of the same. Whereas, in truth and in fact, the said ticket so delivered as last aforesaid by the said John Boulton was then and there not a genuine ticket of or obtained from the said company,

for the conveyance of any person as a passenger by any carriage of the said company, or any journey whatsoever, to the great damage and deception of the said company, to the evil example of all others in the like case offending against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity."

The ticket of the company is in the annexed form: —



And is a voucher for the journey without further payment, but is to be given up to the company at the journey's end.

The prisoner was stopped upon the line before he finished his journey and was taken into custody with the ticket in his possession.

The question reserved by the learned judge was, whether the obtaining such a ticket was obtaining a chattel of the company, with intent to cheat and defraud the company of the same, within the meaning of the Act of Parliament.

On 20th November, 1849, this case was considered by POLLOCK, C. B., PATTESON, J., WIGHTMAN, J., PLATT, B., TALFOURD, J. The Chief Baron said that the JUDGES were unanimously of opinion, that it came within the Stat. 7 & 8 George IV., c. 29, § 53, which makes it criminal to obtain a chattel by a false pretence. The ticket, while in the hands of the party using it, was an article of value, entitling him to travel without further payment; and the fact that it was to be returned at the end of the journey did not affect the question. The conviction was therefore affirmed.

SECTION 3. OBTAINING OF TITLE: CASES OF PARTNERSHIP.

REGINA *v.* WATSON,

7 Cox C. C. 364; DEARS. & B. 348.

REGINA *v.* EVANS,

9 Cox C. C. 238.

SECTION 4. PRETENCE — NOT MERE PROMISE OR ASSURANCE.

REGINA *v.* WALNE,
11 Cox C. C. 647.

SECTION 5. PRETENCE OF FACT COUPLED WITH PROMISE.

REGINA *v.* JENNISON,
9 Cox C. C. 148.

SECTION 6. PRETENCE OF FACT: INTENT AS A FACT.

REGINA *v.* JONES,
6 Cox C. C. 467.

REX *v.* YOUNG,
1 LEACH C. C. 505.

SECTION 7. THE PRETENCE: CREDIBILITY.

REGINA *v.* LAWRENCE,
36 L. T. 404.

REGINA *v.* PARKER,
7 C. & P. 825; 2 MOODY C. C. 1.

SECTION 8. THE PRETENCE: OTHER CASES.

REX *v.* BARNARD,
7 C. & P. 784.

REGINA *v.* BULL,
15 Cox C. C. 608.

REGINA *v.* HUNTER,
10 Cox C. C. 642.

REGINA *v.* RANDELL,
16 Cox C. C. 335.

REGINA *v.* SAMPSON,
52 L. T. R. (N. S.) 772.

SECTION 9. CONTINUING PRETENCE.

REGINA *v.* MARTIN,
L. R. 1 C. C. R. 56; 10 Cox C. C. 383.

SECTION 10. REMOTENESS OF PRETENCE.

REGINA *v.* LARNER,
14 Cox C. C. 497.

COMMONWEALTH *v.* HARKINS,[1]
128 MASS. 79.

SECTION 11. INTENTION TO REFUND.

REGINA *v.* NAYLOR,
10 Cox C. C. 149.

SECTION 12. LIMITATION TO SUBJECTS OF COMMON-LAW LARCENY.

REGINA *v.* ROBINSON,
Bell C. C. 34.

SECTION 13. STATUTORY REVESTING OF TITLE UPON CONVICTION.

BENTLEY *v.* VILMONT,
L. R. 12 APP. CAS. 471.

[1] [See Regina *v.* Taylor, 15 Cox C. C. 265. Same *v.* Same, id. 268.]

CHAPTER XXXVIII.

Receiving Stolen Goods.

Section 1. Limitation to Goods Technically "Stolen."

REGINA v. KENNY,

2 Q. B. D. 307; 13 Cox C. C. 397 [1877]. above, p. 359.

Section 2. Whether Goods Stolen Goods or not at time of Receiving.

REGINA v. DOLAN,

1 Dears. C. C. 436; 6 Cox C. C. 449 [1855].

COURT OF CRIMINAL APPEAL.

The following case was stated by M. D. Hill, Esq., Q. C., Recorder of Birmingham: —

At the Sessions held in Birmingham, on the 5th day of January, 1855, William Rogers was indicted for stealing, and Thomas Dolan for receiving, certain brass castings, the goods of John Turner. Rogers pleaded guilty and Dolan was found guilty.

It was proved that the goods were found in the pockets of the prisoner Rogers by Turner, who then sent for a policeman, who took the goods and wrapped them in a handkerchief, Turner, the prisoner Rogers, and the policeman going toward Dolan's shop. When they came near it the policeman gave the prisoner Rogers the goods, and the latter was then sent by Turner to sell them where he had sold others; and Rogers then went into Dolan's shop and sold them and gave the money to John Turner as the proceeds of the sale. Upon these facts it was contended on the part of Dolan that Turner had resumed the possession of the goods, and that Rogers sold them to Dolan as the agent of Turner, and that consequently at the time they were received by Dolan, they were not stolen goods within the meaning of the statute.

I told the jury, upon the authority of the case of Regina *v.* Lyons and another, Car. & M. 217, cited by the counsel for the prosecution, that the prisoner was liable to be convicted of receiving, and the jury found him guilty.

Upon this finding I request the opinion of the Court of Appeal in Criminal Cases on the validity of Dolan's conviction.

Dolan has been sent back to prison, and I respited judgment on the conviction against him until the judgment of the court above shall have been given.

O'Brien for the prisoner. This conviction cannot be sustained. The objection is, that when the goods reached the hands of Dolan they were not stolen goods. They had been restored to the possession of the owner, and the sale to the prisoner was with the owner's authority.

Lord Campbell, C. J. There seems to be great weight in that objection but for the authority of the case cited. It can hardly be supposed that if goods were stolen seven years ago, and had been in the possession of the owner again for a considerable period, there could be a felonious receipt of them without a fresh stealing.

O'Brien. That was the view taken by the learned recorder; and R. *v.* Lyons, Car. & M. 217, which was cited for the prosecution, does not appear to have been a case much considered. Coleridge, J., in that case, said, that for the purposes of the day, he should consider the evidence as sufficient in point of law to sustain the indictment, but would take a note of the objection.

Coleridge, J. I certainly do not think so to-day.

O'Brien. There is also a slight circumstance of distinction between that case and the present. It does not appear in that case that the stolen property was ever actually restored to the hands of the owner, nor that he expressly directed the thief to take it to the prisoner. (*He was stopped.*)

Beasley for the prosecution. R. *v.* Lyons is expressly in point, and the learned judge who decided it does appear to have had his attention recalled to the point after the conviction, and still, upon deliberation, to have thought there was nothing in the objection. The facts are thus stated in the marginal note: "A lad stole a brass weight from his master, and after it had been taken from him in his master's presence it was restored to him again with his master's consent in order that he might sell it to a man to whom he had been in the habit of selling similar articles which he had stolen before. The lad did sell it to the man; and the man being indicted for receiving it of an evil-disposed person, well knowing it to have been stolen, was convicted and sentenced to be transported seven years." The report adds that after the sentence, "the matter was subsequently called to his Lordship's

attention by the prisoner's counsel, yet no alteration was made in the judgment of the court; from which it is to be inferred that, upon consideration, his Lordship did not think that in point of law the objection ought to prevail." The present is, however, a stronger case than that; because here in truth the master did not recover possession of the stolen goods. They were in the hands of the police; and what the master did must be considered as done under the authority of the police.

LORD CAMPBELL, C. J. No; the policeman was the master's agent.

PLATT, B. And the sale was by direction of the master.

Beasley. The statute does not require that the receipt should be directly from the thief. It only requires that the prisoner should receive stolen goods, knowing them to have been stolen; and that is proved in this case. In many cases it has been held that where the owner of property has become acquainted with a plan for robbing him, his consent to the plan being carried out does not furnish a defence to the robbers. R. *v.* Egginton, 2 B. & P. 508.

LORD CAMPBELL, C. J. But to constitute a felonious receiving, the receiver must know that at that time the property bore the character of stolen property. Can it be said that, at any distance of time, goods which had once been stolen would continue to be stolen goods for the purpose of an indictment for receiving, although in the mean time they may have been in the owner's possession for years?

CRESSWELL, J. The answer to that in this case seems to be that the policeman neither restored the property nor the possession to the master; that the goods were in the custody of the law; and that the master's presence made no difference in that respect.

Beasley. That is the argument for the prosecution; and it is manifest that if the policeman had dissented from the plan of sending Rogers to Dolan's shop, the master could not have insisted upon the policeman giving up the property to him.

LORD CAMPBELL, C. J. I feel strongly that this conviction is wrong. I do not see how it can be supported, unless it could be laid down that, if at any period in the history of a chattel once stolen, though afterwards restored to the possession of the owner, it should be received by any one with a knowledge that it had been stolen, an offence would be committed within the statute. I think that that would not be an offence within the statute any more than it would make the receiver an accessary to the felony at common law. If the article is restored to the owner of it, and he, having it in his possession, afterwards bails it to another for a particular purpose of delivering it to a third person, and that third person receives it from that bailee, I do not see how it can, under these circumstances, be feloniously received from that bailee. Then what are the facts here? [His Lordship

stated the facts as above.] Turner, the owner, therefore had I think as much possession of the goods as if he had taken them into his own hands, and with his own hands delivered them to another person for a particular purpose, which was performed. He was, subsequent to the theft, the bailor and the other person was the bailee of the goods. Then they were carried to the prisoner by the authority of the owner; and I cannot think that under those circumstances there was a receiving within the statute. As to the case cited, I cannot help thinking that the facts cannot be quite accurately stated, and that there was something more in that case than appears in the report; but if not, I am bound to say that I do not agree in that decision.

Coleridge, J. I have no recollection of the case cited, and I have no right, therefore, to say that it is not accurately reported; but, assuming it to be so, I am bound to say that I think I made a great mistake there. What is the case? If for a moment the interference of the policeman is put out of the question, the facts are, that the goods which had been stolen were restored to the possession of the real owner and were under his control, and having been so restored, they were put again into the possession of Rogers for a specific purpose, which he fulfilled. It seems then to me that when, the second time, they reached the hands of Rogers, they had no longer the character of stolen goods. Then, if that would be the case, supposing the policeman to be out of the question, does the interference of the policeman according to the facts here stated make any difference? I think not. It is the master who finds the goods and sends for a policeman; and it is by the authority of the master that the policeman takes and keeps the goods, and afterwards hands them back to Rogers. Indeed, it seems to me that all that was done was done by Turner's authority; and that it must be considered that the property was under the control of the real owner when he sent Rogers with them to the prisoner. In this state of facts, the interference of the policeman seems to me of no importance.

Cresswell, J. I do not dissent from the decision that this conviction is wrong; but as we are called upon in this court to give the reasons of our judgment, I must say that I cannot concur in all the reasons which I have heard given in this case. If it had been necessary to hold that a policeman, by taking the stolen goods from the pocket of the thief, restores the possession to the owner, I should dissent. I think that we cannot put out of question the interference of the policeman; and that while the goods were in his hands they were in the custody of the law; and that the owner could not have demanded them from the policeman or maintained trover for them. But as the case finds that the policeman gave them back to Rogers, and

then the owner desired him to go and sell them to Dolan, I think that Rogers was employed as an agent of the owner in selling them, and that consequently Dolan did not feloniously receive stolen goods.

PLATT, B. I am of the same opinion. The case is, that the stolen goods were found by the owner in the pocket of the thief. They were restored to his possession, and it does not appear to me very material whether that was done by his own hands or by the instrumentality of the policeman. Things being in that state, it seems to have come into their heads that they might catch the receiver; and it was supposed that by putting the stolen property back into the custody of Rogers, they could place all parties *statu quo* they were when the property was found in the pocket of Rogers; but I agree with the rest of the court that the act of Parliament does not apply to a case of this kind; for if it did, I see no reason why it should not equally apply to restored goods stolen ten years ago.

WILLIAMS, J. The reason why I think the conviction wrong is, that the receipt, to come within the statute, must be a receipt without the authority of the owner. Looking at the mere words of the indictment, every averment is proved by this evidence; but then the question is, whether such a receipt was proved as is within the statute, namely, a receipt without the owner's authority; and here Rogers was employed by the owner to sell to Dolan. *Conviction quashed.*

REGINA *v.* SCHMIDT,

L. R. 1 C. C. R. 15; 10 Cox C. C. 172 [1866].

COURT OF CRIMINAL APPEAL.

CASE reserved for the opinion of this Court by the deputy-chairman of the Quarter Sessions for the western division of the County of Sussex.

John Daniels, John Scott, John Townsend, and Henry White were indicted for having stolen a carpet-bag and divers other articles, the property of the London, Brighton, and South Coast Railway Company; and the prisoner, Fanny Schmidt, for having feloniously received a portion of the same articles, well knowing the same to have been stolen.

The evidence adduced before me as deputy-chairman of the Court of Quarter Sessions at Chichester, for the western division of the County of Sussex, on the 20th October, 1865, so far as relates to the

question I have to submit to the Court of Criminal Appeal, was as follows: —

On the 29th July, 1865, two passengers by the prosecutors' line of railway left a quantity of luggage at the Arundel station, which luggage was shortly afterwards stolen therefrom.

On the 30th July a bundle containing a portion of the stolen property was taken to the Angmering station, on the same line of railway, by the prisoner Townsend, and forwarded by him to the female prisoner, addressed "Mr. F. Schmidt, Waterloo Street, Hove, Brighton." The bundle was transmitted to Brighton, in the usual course, on Sunday morning, the 30th.

Meanwhile the theft had been discovered, and shortly after the bundle had reached the Brighton station, a policeman (Carpenter) attached to the railway company, opened it, and having satisfied himself that it contained a portion of the property stolen from the Arundel station, tied it up again, and directed a porter (Dunstall) in whose charge it was, not to part with it without further orders.

About 8 P. M. of the same day (Sunday, 30th), the prisoner John Scott went to the station at Brighton and asked the porter (Dunstall) if he had got a parcel from the Angmering station in the name of Schmidt, Waterloo Street. Dunstall replied, "No." Scott then said, "It is wrapped up in a silk handkerchief, and is directed wrong; it ought to have been directed to 22 Cross Street, Waterloo Street." Dunstall, in his evidence, added, "I knew the parcel was at the station, but I did not say so because I had received particular orders about it."

The four male prisoners were apprehended the same evening in Brighton on the charge, for which they were tried before me and convicted.

On Monday morning, the 31st July, the porter (Dunstall), by the direction of the policeman (Carpenter), took the bundle to the house No. 22 Cross Street, Waterloo Street, occupied as a lodging-house and beer-house by the female prisoner and her husband (who was not at home or did not appear), and asked if her name was Schmidt, on ascertaining which he left the bundle with her and went away. Carpenter and another policeman then went to the house, found the bundle unopened, and took the prisoner to the town hall.

All the prisoners were found guilty, and I sentenced each of them to six months' imprisonment with hard labor. They are now in Petworth jail in pursuance of that sentence.

At the request of the counsel for the female prisoner I consented to reserve for the opinion of this Court the question,

Whether the goods alleged to have been received by her had not,

under the circumstances stated, lost their character of stolen property, so that she ought not to have been convicted of receiving them with a guilty knowledge within the statute.

HASLER HOLLIST.

Pearce (*Willoughby* with him) for the prisoner. The conviction is wrong. To support a conviction for receiving stolen goods, it must appear that the receipt was without the owner's authority. In this case, in consequence of the conduct of the railway company, the property had lost its character of stolen property at the time it was delivered at the receiver's house by the railway porter. The property is laid in the indictment as the property of the railway company, and Carpenter was not an ordinary policeman, but, as the case states, a policeman attached to the railway company. He opens the bundle, and finding therein some of the stolen property, he gives it to Dunstall and orders it to be detained until further orders, and in the meantime the thieves were arrested; Carpenter then directs Dunstall to take the bundle to the receiver's house, so that the receiver got the stolen property from the railway company, who alone on this indictment are to be regarded as the owners of the property. The railway company, the owners, having got their property back, make what must be considered a voluntary delivery of it to the receiver. The case is similar to Regina *v.* Dolan, 6 Cox C. C. 449; 1 Dears. C. C. 436, where, stolen goods being found in the pockets of the thief by the owner, who sent for a policeman, and then, to trap the receiver, the goods were given to the thief to take them to the receiver's, which he did, and the receiver was afterwards arrested, it was held that the receiver was not guilty of feloniously receiving stolen goods, inasmuch as they were delivered to him under the authority of the owner. In that case Regina *v.* Lyons, Car. & M. 217, was expressly overruled. Lord Campbell, C. J., said, in Regina *v.* Dolan, "If an article once stolen has been restored to the owner, and he having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the Act of Parliament?"

Hurst, for the prosecution. Unless this case is distinguishable from Regina *v.* Dolan, the conviction, it must be conceded, is wrong. But the facts of this case are more like the view taken by Cresswell, J., in Regina *v.* Dolan, "That while the goods were in the hands of the policeman, they were in the custody of the law; and the owner could not have demanded them from the policeman, or maintained trover for them." In that case the real owner intervened, and had manual possession of the stolen goods; here he does not. The goods

belonged to the railway passenger and the company are only bailees. [MELLOR, J. The policeman merely opened the bundle in the course of its transit to see what was in it, and then sent it according to its direction. It was in the hands of the policeman, not of the company. ERLE, C. J. Suppose a laborer steals wheat, and he sends it by a boy to his accomplice, and the policeman stops the boy, ascertains what he has got, then tells him to go on, and follows and apprehends the accomplice, is not the accomplice guilty of feloniously receiving? MELLOR, J. Here the policeman does nothing to alter the destination of the bundle. The element of the real owner dealing with the stolen property is wanting in this case. KEATING, J. Scott directs the address to be changed.] The bundle was sent by the thieves through the railway company to the receivers; the real owner had nothing to do with this part of the transaction. [LUSH, J. If the true owner had sued the company for the property, the company could not have justified detaining or converting it.] If a policeman knows of stolen goods being in the hands of an innocent agent, and does not take possession for the owner, and the innocent agent, by the policeman's directions, delivers them to a receiver, that does not prevent the receiver being guilty of feloniously receiving.

Pearce, in reply. Before the bundle was sent out for delivery the thieves were in custody, and having secured them, Carpenter then gives orders for the bundle to be delivered to the receiver. Carpenter was the servant of the railway company, who are the owners for the purpose of this indictment, and the delivery therefore was by the owners.

[ERLE, C. J., and MELLOR, J., were of opinion that the conviction was right, but MARTIN, B., KEATING, and LUSH, JJ., held the conviction wrong. In consequence of the prisoner having suffered half the term of imprisonment from inability to get bail and the further unavoidable delay, the case was not sent to be argued before all the judges.]

MARTIN, B. I think that this conviction was wrong on two grounds, the one substantial, the other formal. I think that *Mr. Pearce's* argument, founded on the indictment, that the property is there laid to be property of the railway company, is well founded; and it seems to me that Dolan's case applies to this.

ERLE, C. J. I am of opinion that the conviction was right. The question is whether, at the time this stolen property was received by the prisoner, it was the property of the London and Brighton Railway Company; and if so whether, when the policeman Carpenter caused the delivery to be stopped for the purpose of detecting the parties implicated, it thereby lost the character of stolen property. If it had lost the character of stolen property at the time it was received by the

prisoner, the receiving by her will not amount to felony. But in this case I think that the railway company, when they took this bundle into their possession, were acting as bailees of the thief, and were innocent agents in forwarding it to the receiver, and that the things did not lose their character of stolen property by what was done by the policeman.

KEATING, J. I agree with my brother Martin that the conviction was wrong. It seems conceded, on the authority of Dolan's case, that if the property had got back again for any time into the hands of the true owner, the conviction would be wrong. It is said that, in this case, the owners mentioned in the indictment, the railway company, were not the real owners, whereas in Dolan's case the real owner intervened. But I think there is no distinction in principle between this case and that. The railway company are alleged in the indictment to be the owners of the property, and we sitting here can recognize no other persons than them; they are the owners from whom the property was stolen, and it got back to their possession before it was received by the prisoner. I can see no real distinction between this case and Dolan's. All the reasons given for the judgment in that case apply equally to the case of the ownership in this case. The principle I take to be, that when once the party having the right of control of the property that is stolen gets that control, the transaction is at an end, and there can be no felonious receipt afterwards. I think the test put by my brother Lush in the course of the argument, as to the real owner suing the railway company for the property after they had got the control of it, is decisive of the matter.

MELLOR, J. I agree entirely with my brother Erle, C. J., and think the conviction was right. The indictment rightly alleges the property to have been in the railway company at the time it was stolen; they had the bailment of it from the true owner. Then it is stolen while in their custody, and the next step is, the thieves afterwards send a portion of it by the same railway company to be forwarded to the receiver at Brighton; so that the railway company get possession of this part from the thieves under a new bailment. Then the policeman examines the property and directs it not to be forwarded until further orders; but this was not done with the view of taking possession of it or altering its transit, but merely to see whether it was the stolen property. I agree with Dolan's case, but in the present case I think the stolen property had not got back to the true owner.

LUSH, J. I agree with my brothers Martin, B., and Keating, J., and think that the conviction was wrong. I think that the goods had got back to the owner from whom they had been stolen. Had the railway company innocently carried the goods to their destination and delivered them to the prisoner, the felonious receipt would have been

complete; but while the goods are in their possession, having been previously stolen from them, the goods are inspected, and as soon as it was discovered that they were the goods that had been stolen, the railway company did not intend to carry them on as the agents of the bailor; the forwarding them was a mere pretence for the purpose of finding out who the receiver was. It was not competent to the railway company to say, as between them and the original bailor, that they had not got back the goods. They were bound to hold them for him. In afterwards forwarding the goods to the prisoner, the company was using the transit merely as the means of detecting the receiver.

MARTIN, B. I only wish to add that I meant to say that I think the conviction wrong in substance in consequence of the interference of the policeman with the property, and this independently of the form of indictment.[1]

Conviction quashed.

UNITED STATES *v.* DEBARE,

6 BISS. 358.

THE indictment charged that on the 19th of November, 1874, the defendant, with intent to defraud the United States, wilfully and feloniously received from one Crawford a quantity of postage stamps, the said stamps having been stolen from a post-office of the United States, and the defendant, at the time he received the same, knowing them to have been stolen.

At the trial the testimony disclosed the following facts: —

In the night of November 12, 1874, the post-office at Unionville, Missouri, was robbed by Crawford, and postage stamps to the amount of about $156 were stolen. The robber was detected and arrested at Quincy, Ill. Previous to his arrest, he had deposited the stamps in the form of an enclosed package in the express office at Quincy, directed to the defendant at Milwaukee, Wisconsin. After his arrest, he surrendered other property stolen from the Unionville post-office, and on request of the Quincy postmaster gave the latter a written order on the agent of the express company for the package of stamps. Upon presentation of this order at the express office the stamps were delivered to the Quincy postmaster, who testified that he took the package to his office, opened it, counted the stamps, and placed them in the post-office vault. He thus retained possession of the stamps until subsequently ordered by the post-office department to let them

[1] [See Regina *v.* Hancock, 14 Cox C. C. 119 (1878).]

go forward to the consignee. Using the external wrapper and fastenings he found upon the package when it came to his possession, he re-inclosed the stamps and re-deposited them in the express office to be forwarded, the package bearing the identical directions placed upon it by the original consignor.

Testimony was given on the trial to show that the stamps after being thus forwarded came to the hands of the defendant. The jury were instructed, that in order to convict, it must be proven as charged in the indictment, that the defendant received the stamps from Crawford, and that if the jury should find from the evidence that the Quincy postmaster, as his individual act, or for and in behalf of the post-office department, forwarded the stamps to the defendant, and that the defendant received them from the postmaster and not from Crawford, there must be a verdict of acquittal, even though the stamps were originally stolen by Crawford. The verdict was against the accused. His counsel moved for a new trial on two grounds: —

1st. That the verdict was against the evidence and the instructions of the Court, and moreover, upon the facts proved, that the jury should have been directed to render a verdict of acquittal.

2d. That when the stamps came into the hands of the Quincy postmaster, their character was that of stolen property recovered by the owner; that they thereafter ceased to have that character, and that when received by the defendant, they were not, as to the person from whom they came, stolen stamps, and therefore there could be no conviction in this case.

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DYER, J. . . . The ownership of these stamps was in the United States. The Quincy postmaster was the agent of the owner. When Crawford surrendered them to this agent they were reclaimed property that had been stolen, but their character as stolen property ceased in the hands of the postmaster, so far as the subsequent receiver was concerned. The moral turpitude of a receiver under such circumstances may be as great as in case the property comes directly from the hands of the thief, because the criminal intent on his part exists equally in both cases. But to create the offence which the law punishes, the property when received must, in fact, and in a legal sense, be stolen property. If these stamps were received by the defendant, they did not, when received, upon the proof made bear this character. They had been captured from the thief by the owner, and the act of forwarding them to the alleged receiver was the act of the owner.

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Section 3. Only Goods Stolen Within the Jurisdiction.

REX *v.* PROWES,

1 Moody C. C. 349 [1832].

CROWN CASE RESERVED.

REGINA *v.* MADGE,

9 C. & P. 29 [1839].

The prisoner was indicted for stealing, within the jurisdiction of the Central Criminal Court, various articles of household furniture, etc., belonging to one Colonel Latour.

Clarkson, for the prosecution, stated to his Lordship that the property in question had been deposited by the prosecutor in a house at Boulogne, in France, and that the prisoner had stolen it at Boulogne, but being found in possession of it at the custom house in London he had been taken before the Lord Mayor, who had committed him for trial.

Parke, B. There is a case precisely in point on the subject.

Clarkson. Your Lordship alludes to the case of Rex *v.* Prowes.[1] That case even goes further than the present, for there the property was taken at Jersey, which is under the dominion of the British Crown, and yet it was held that the courts here had not jurisdiction. I recollect also a case before Mr. Serjeant Arabin in which I, not being aware of the decision of the judges, thought that the bringing of the property into England was a larceny, and Mr. Serjeant Arabin thought so too, and the prisoner was convicted; but I am bound to say that a pardon was afterwards granted on the ground that the decision of the learned judge was incorrect.

Parke, B. There is no doubt upon the point on the authority of Rex *v.* Prowes. That case is precisely in point, though rather stronger than the present.

His Lordship afterwards said that it had been intimated to him that some of the judges had expressed a wish to have the case of Rex *v.* Prowes reconsidered, and that in consequence of this the Lord Mayor had committed the prisoner; but if it was not so he should act upon the authority of the decision in that case. His Lordship, having caused

[1] Ry. & Moody C. C. R., 349.

a communication to be made to the Lord Mayor upon the subject and having received his answer, directed the prisoner to be brought up and the jury to be charged with the indictment. The prisoner was accordingly put to the bar and the jury charged.

PARKE, B., upon this said that the Lord Mayor had not committed the prisoner for trial in consequence of any intimation from the judges that it was desirable to reconsider the case of Rex *v.* Prowes, but it was thought right that the prisoner should be publicly tried and acquitted in order that the attention of the legislature might be drawn to the state of the law in case they should think it right to interfere by any legislative provision on the subject. His Lordship then told the jury that they had no jurisdiction so as to convict the prisoner and therefore they must pronounce a verdict of acquittal.

Verdict, not guilty.

REGINA *v.* CARR,

15 Cox C. C. 129 [1882].

CROWN CASE RESERVED.

CASE reserved for the opinion of this Court by North, J.

The prisoners were tried before me at the Old Bailey at the Session of the Central Criminal Court on the 13th day of September last for felony in respect of twenty-five bonds (£20 each) of Egyptian Preference Stock, two bonds of 1000 dollars (ten shares) and 500 dollars (five shares) respectively of the Illinois Railway, and thirty other bonds of Egyptian Unified Stock.

The first count charged the prisoners with stealing these securities upon the high seas within the jurisdiction of the Admiralty of England; the second count charged that they being British subjects within the jurisdiction of the Admiralty of England upon the British ship "Avalon," then being in a certain foreign port, to wit, the port of Rotterdam, stole the same securities; the third count charged them with larceny of these securities within the jurisdiction of the Central Criminal Court; the fourth count charged them with receiving the same securities within the jurisdiction of that court, well knowing them to have been stolen; and the fifth and sixth counts respectively charged them with having been accessaries after the fact to the theft and the receiving respectively of the same securities by persons unknown.

A copy of the abstract of the indictment was set out in the schedule to this case and the indictment may be referred to as a part thereof.

I was asked by the counsel for the prisoner Wilson to quash the

second count of the indictment; but it was suggested by *Sir H. Giffard*, Q. C., who appeared for the prisoner Carr, that the better course would be that the prisoners should refuse to plead, and I should direct pleas of not guilty to be entered, and this was accordingly done.

The material facts proved were as follows: —

1. On the 12th day of July last the above mentioned Egyptian Preference Stock and Illinois bonds were made up by Messrs. Kelker & Co., bankers at Amsterdam, into a parcel which was marked outside "value £50," and was addressed to Messrs. Mercia, Backhouse, & Co., in London. The Unified Stock was made up into another parcel similar to the first except that it was marked outside as "value £100." These parcels were of a class known as "valued parcels." They were traced clearly from Amsterdam to Rotterdam, to the office of Messrs. Pieters & Co., the agents there of the Great Eastern Railway Company, on whose behalf they were received.

2. There was evidence that these two parcels were (with two others) taken from Pieters & Co.'s office by a man employed by them for that purpose and placed by him on board the steamship "Avalon" about half-past five P. M. on the same 12th July.

3. The "Avalon" is a British vessel registered at Harwich and sailing under the British flag. She is about 240 feet in length with a gross tonnage of 670 tons, and draws about ten feet six inches of water when loaded. She is the property of the Great Eastern Railway Company and is regularly employed by them in their trade between Harwich and Rotterdam. On the evening in question she was lying in the river Maas, at Rotterdam, about twenty or thirty feet (the captain also described it as "about the breadth of the court") from the quay and against a "dolphin," a structure of piles for the use of the company's ships only, projecting from the quay for the purpose of keeping vessels off the quay. She was moored to the quay in the usual manner.

4. The place where the "Avalon" was lying was in the open river, sixteen or eighteen miles from the sea. There is not any bridge across the river between that point and the sea. The tide ebbs and flows there and for many miles farther up the river. The place where the "Avalon" was lying at the dolphin is never dry and that vessel would not touch the ground there at low water. The Admiralty chart showing the river Maas from Rotterdam to the sea was put in evidence at the suggestion of the counsel for the prisoners and was proved by the captain of the "Avalon" to be correct. It is marked J. T. H. 1.

5. While the "Avalon" was lying at the dolphin, as above described, persons were allowed to pass backward and forward between her and the shore without hindrance.

6. The "Avalon" sailed for England the same evening, about six o'clock, and arrived at Harwich the following morning. Upon her arrival the two valued parcels above mentioned (and one of the other parcels) were at once missed, and upon inquiry it was found that they had been stolen. The parcel containing the Unified Stock and the third parcel have never since been traced; but the parcel containing the Egyptian Preference Stock and the Illinois bonds was found in the prisoners' possession on the 1st August.

7. The prisoners are British subjects.

8. It was contended for the prisoners that there was no evidence upon which the jury could find them guilty upon the counts charging them with stealing the securities. I was of that opinion, and so directed the jury, and the prisoners were accordingly acquitted upon those counts.

9. It was also contended for the prisoners that unless the jury found that the securities had been stolen from on board the "Avalon" the prisoners must be acquitted, as, if they had been stolen after leaving Pieters & Co.'s office and before reaching the ship, the offence of stealing them was one which this court had not jurisdiction to try, and therefore the prisoners could not be tried here for receiving, according to the case of Regina *v.* John Carr[1] (one of these prisoners), reported in

[1] REGINA *v.* CARR.

(Central Criminal Court. Before Mr. Justice Denman. November 22d, 1877.)

John Carr was indicted for stealing 168 bonds of the Peruvian Government, the property of Lionel Cohen and others; second count for feloniously receiving the same.

There were other counts charging him as an accessary before and after the fact.

The *Solicitor-General* and *Poland* were counsel for the prosecution and *Besley* and *Grain* for the defence.

The bonds in question, on the 2d June, 1877, were transmitted by the prosecutors to a customer in Paris. They were traced safely as far as Calais and were stolen from the train after leaving that place.

On the 4th of September the prisoner was found dealing with them in London, and the question arose as to the jurisdiction of this court to try the case, the robbery having been committed in France.

The *Solicitor-General* submitted that the prosecutors never having parted with their property in the bonds, they were still under the protection of the law, and that the subsequent possession of the bonds in this country was sufficiently recent to enable the jury to find a verdict of larceny against a person who was dishonestly dealing with them here. The decision in Rex *v.* Prowes, 1 Moody C. C. 349, was certainly opposed to this view; but no reasons were given for that judgment and a doubt as to the soundness of the decision was expressed by Parke, B., in Regina *v.* Madge, 9 C. & P. 29. The case of Regina *v.* Debrueill, 11 Cox C. C. 207, was referred to. As to the counts charging the prisoner with receiving and also as an

vol. lxxxvii., p. 46, of the Sessions Papers at the Central Criminal Court, and the cases there cited. I took this view and directed the jury that unless they were satisfied that the securities had been taken from the "Avalon" they must acquit the prisoners. They found both the prisoners guilty.

10. I was not asked to leave and did not leave any question to the jury whether the securities were stolen before or after the "Avalon" commenced her voyage from Rotterdam. There was no evidence upon which the jury could have found that the theft occurred after the voyage began; the evidence rather pointed to its having occurred before she sailed.

11. It was further argued on the prisoners' behalf that even if the securities had been stolen from the "Avalon" there was nothing to show that they had been taken from a British subject and therefore the case did not come within the Acts 17 & 18 Vict. c. 104, § 267, 18 & 19 Vict. c. 91, § 21, or 30 & 31 Vict. c. 124, § 11, and the thief was amenable to the law in Holland only; and further that the case of Regina *v.* Anderson, L. R. 1 C. C. R. 161; 11 Cox C. C. 198, was no authority to the contrary, inasmuch as the prisoner in that case, though a foreigner, was one of the crew of a British vessel and therefore owed allegiance to the law of England, and upon that ground could be tried here. The counsel of the Crown did not dispute that the offender might be tried in Holland but insisted that he might be tried here also.

12. I expressed my opinion that if the "Avalon" had at the time when the securities were stolen been sailing up or down the river Maas,

accessary the 24 & 25 Vict. c. 94 contemplated a case of this kind, where the original offence was committed abroad.

Besley relied on the decision in Rex *v.* Prowes (*ubi sup.*) and Regina *v.* Hogetoran (Cent. Crim. Court Sess. Paper, vol. 79, p. 268) and Regina *v.* Nadal (84 Cent. Crim. Court Sess. Paper, p. 295).

DENMAN, J. There can be no doubt that this was a larceny fully completed in France. I do not at all say that it might not be a very reasonable thing that any one afterwards dealing here with property so stolen might make cogent evidence of having received them knowing them to have been stolen, just as much as if they had been stolen in England; but it appears to me that the point has been too solemnly decided for me to give the go-by to those decisions. It has been solemnly decided and acted upon so often that there is no jurisdiction in England to try a case where the stealing has been committed abroad, either against the principal or the accessary, that I have nothing to do but to act upon those decisions and to direct an acquittal in this case. I entertain no doubt that the case of Rex *v.* Prowes (*ubi sup.*) is directly in point and Regina *v.* Madge (*ubi sup.*) fortifies it to the extent of recognizing and acting upon it. Debrueil's case also decides that a conviction of receiving under similar circumstances could not be sustained. The prisoner must therefore be acquitted.

the person who took them, whether an Englishman or a foreigner, could clearly have been tried here upon the authority of Regina *v.* Anderson; that the law is the same whether the ship be anchored or sailing, as appears from the cases of Rex *v.* Jemot, and Rex *v.* Allen, 7 C. & P. 664; 1 Moody's C. C. 494, where the vessels were lying in port, and which cases are referred to by Lord Blackburn with approval in Regina *v.* Anderson; and that it could not make any legal difference whether the vessel was made fast to the bottom of the river by anchor and cable or to the side of the river by ropes from the quay. I also expressed my opinion that although the fact that the prisoner in Regina *v.* Anderson was one of the crew was referred to more than once in the judgment of Bovill, C. J., it was not mentioned by any of the other judges and was not the ground of the decision; and that it made no difference in the present case whether the securities stolen from the "Avalon" were taken by one of the crew or passengers or by a stranger from the shore.

13. I directed the jury accordingly telling them that if they came to the conclusion that the securities were taken from the ship the taking them was an offence which could be tried here; and that if so the prisoners could now be tried here for receiving and could be found guilty of that offence if the jury thought the facts proved warranted such a finding. I stated at the same time that I should, if necessary, reserve the point for the consideration of this court.

14. With respect to the receiving no difficulty of law arose and no point was reserved.

15. The jury found both prisoners guilty upon the fourth count. I postponed passing sentence until the opinion of the Court is given; and the prisoners remain in custody.

The question upon which I desire the opinion of this Court is whether under these circumstances there was any jurisdiction to try the prisoners at the Old Bailey for the offence of which they have been found guilty. If answered in the affirmative the conviction is to stand. If otherwise the conviction is to be quashed; but the prisoners are to remain in custody to be tried upon another indictment on which a true bill against them has been found by the grand jury.

FORD NORTH.

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COLERIDGE, C. J. This case has been argued at some length and the question raised by it is no doubt of considerable importance. The facts are these: The bonds which the prisoners have been convicted of feloniously receiving were on board an English ship in the river Maas off Rotterdam in front of a "dolphin," and was moored by ropes to the land of Holland. The tide ebbs and flows in the river, and at the place

where she was lying in front of the "dolphin" there is always enough water to float ships of her class. There was no actual proof when or by whom the bonds were stolen. The case states, "There was no evidence upon which the jury could have found that the theft occurred after the voyage began; the evidence rather pointed to its having occurred before she sailed." Whether the bonds were carried off the ship on to the shore and sent by some conveyance to the prisoners in England or whether they were brought by the prisoners to England does not appear. The prisoners were acquitted of stealing the bonds and found guilty of receiving them with guilty knowledge that they had been stolen. It is obvious that the prisoners could not be convicted of feloniously receiving the bonds unless they were stolen within the same jurisdiction where the receiving took place, and therefore it becomes material to inquire whether the jurisdiction of the Admiralty attached so that the prisoners could be tried at the Old Bailey. It is admitted that the exact point raised in this case has never arisen for decision in our courts before. There appear but two points for us to decide. 1. Was the ship within the jurisdiction of the Admiralty so as to make offences committed upon it triable according to the English law? 2. If that point is answered in the affirmative were the prisoners, according to the decisions, liable to be tried in the English courts? First, as to the place. The place appears to me to come within the old definition of the Admiralty jurisdiction. The ship was at a part of the river which is never dry and where it would not touch the ground at low water, and the tide ebbs and flows in the river and great ships do lie and hover there. That is sufficient to bring this ship within the Admiralty jurisdiction. Without saying that the reports of the case of Rex *v.* Jemot and Rex *v.* Allen (*ubi sup.*) are as full as could be desired, it seems very difficult to draw any tangible distinction between them and the present case. This case also falls within the decision of Regina *v.* Anderson (*ubi sup.*) where the ship was half-way up the river Garonne in France, and at the time of the offence about three hundred yards from the nearest shore, and this Court held, the prisoner having been convicted of manslaughter, that the offence had been committed within the jurisdiction of the Admiralty and that the Central Criminal Court had jurisdiction to try the prisoner. I am unable to distinguish this case from that, but if anything Regina *v.* Anderson seems an *a fortiori* case. Then, as to the second point, whether there is anything in the personality of the prisoners which would make them not liable by the law of England. It is true that some of the judges in Regina *v.* Anderson (*ubi sup.*) place reliance upon the fact that the prisoners formed part of the crew of the vessel, but Bovill, C. J., in his judgment points out that England has always insisted on her right to legislate for per-

sons on board her vessels in foreign ports. None of the judges suggested that their judgments would have been in any way altered if the prisoners had not in those cases formed part of the crew. I think it makes no difference whether a person is a British subject or not who comes on board a British ship where the British law reigns and places himself under the protection which that flag confers; if he is entitled to the privileges and protection of the British ship he is liable to the disabilities which it creates for him. I am unable therefore to make a distinction between a passenger or stranger on board a ship and one of the crew, and it makes no difference in my mind whether the person is on board voluntarily or involuntarily; if while on board he is entitled to the protection of its flag, he is also bound by the obligations imposed by the law governing that ship. The utmost that can be said as regards the theft in this case is that the bonds may have been stolen by some one who came on board casually; it may be a foreigner who took them off the vessel at Rotterdam. Suppose the thief had not been able to get off the ship and had been captured and brought here, could he have been tried here? In my opinion he could, for if while he was on board the ship he was entitled to the protection of the British flag he was at the same time equally liable to the disabilities of the criminal law of this country. It appears to me that the evidence shows that the bonds were stolen within the jurisdiction of the English law, and I am of opinion that the prisoners therefore were triable at the Central Criminal Court for receiving them, well knowing them to have been stolen. I think that the conviction should be affirmed.

POLLOCK, B. I am of opinion that the conviction should be affirmed. The prisoners were convicted of the offence of feloniously receiving stolen goods, and the question is, Were the prisoners within the jurisdiction of the Central Criminal Court for all purposes? The general rule of law is that a person on board an English ship is to be treated as within the dominion of the English Crown; and it is admitted that if the ship had been on the high seas or had been moored in the middle of the river this rule would have applied to the case. Then what distinction can there be because the ship was tethered by ropes to the shore? I think there is no distinction. She was a large ship carrying passengers and goods from Harwich to Rotterdam, and was in a tidal river at Rotterdam at a spot where great ships go. She was there for the purpose of unloading and when unloaded would return to Harwich. I think therefore the conviction was right.

LOPES, J. I think, also, that the conviction should be affirmed. As to the question of the thief not being one of the crew of the vessel, I do not think that that matters. The thief was on board an English ship at the time the bonds were stolen and therefore came within the English law.

STEPHEN, J. Since the time of Richard II. the jurisdiction of the Admiralty has been extended to waters where great ships go. There are many statutes which gave jurisdiction to particular courts in particular cases. But the jurisdiction of the Admiralty itself has never been defined in any other way than as laid down in the reported cases. The case of Rex *v.* Jemot bears on the question of local jurisdiction and decided that the Admiralty had jurisdiction over a theft on board an English vessel in a Spanish port, and shows that the jurisdiction of the Admiral was not confined to the waters outside creeks, ports, harbors, etc. Rex *v.* Allen (*ubi sup.*) is to the same effect. Regina *v.* Anderson (*ubi sup.*) goes further and affects both the questions of place and person, the place being in a foreign river and the person being an American subject who had committed manslaughter on board an English ship. No doubt the prisoner was one of the crew of that ship; but it seems to me that we cannot lay down the rule in narrower terms than that the jurisdiction of the Admiral extends to all tidal waters where great ships go and to all persons on board of them whether foreigners or not. There is no reason which should induce us to lay down restrictions to the extent which has been contended by the prisoners' counsel, that the Admiralty jurisdiction extends only when the British flag is flying and not when it is lowered. It seems to me that the protection of the British flag and the English jurisdiction are coextensive and that protection and obedience must co-exist. I think therefore that the thief in this case, if he had been captured, might have been tried at the Old Bailey.

WILLIAMS, J. I concur.

Conviction affirmed.

COMMONWEALTH *v.* ANDREWS,

2 MASS. 14 [1806].

THE indictment set forth that one Amos Tuttle, at Boston, in the County of Suffolk, feloniously stole certain goods, the property of Moses Dow; and that the defendant Andrews "at Boston, aforesaid, in the County of Suffolk, aforesaid, on the same second day of July, did abet and maintain him, the said Tuttle, in committing and perpetrating the said felony and theft, and there, after the said goods and chattels were stolen as aforesaid, knowingly did receive all the same goods and chattels of him the said Tuttle, knowing the same to have been stolen, taken and carried away as aforesaid, against the peace," etc.

It appeared in evidence that Tuttle stole the goods at Bedford, in

the State of New Hampshire, and immediately brought them to Dunstable in Massachusetts, and there concealed them in a wood. He was pursued, arrested, carried back to New Hampshire, and there committed to prison. By information obtained from him while in prison, by one Symonds, whom Tuttle believed to be an accomplice, but who in fact was the agent of a voluntary association instituted for detecting thieves, etc., and bringing them to punishment, the goods were found, and with Tuttle's consent, carried to Groton in the County of Middlesex, and afterwards to Harvard, in the County of Worcester. In the meantime Symonds, for a sum of money much less than the value of the goods procured from Dow a bill of sale or release of his right in them, without disclosing to him that he had them in possession, and with the sole view, as he testified, of procuring the conviction of Andrews, whom he and his associates believed to be in the practice of receiving stolen goods. Tuttle having been liberated on bail, in company with Symonds, took the goods at Harvard, brought them to Boston, and there sold them to Andrews, the defendant, in a manner and under circumstances which showed satisfactorily that he must have known them to have been stolen. The defendant was convicted, and now *Parsons* and *Otis* of counsel for him moved for a new trial, as on a verdict against evidence.

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Dana, C. J. We all concur in opinion upon this point. In the case of Paul Lord, which has been referred to, this objection was taken and fully argued on the trial. The counsel for the defendant proposed to take a special verdict; but as the facts were all before the court and they agreed in opinion upon the law, the jury were instructed that the indictment appeared to the Court to be well maintained by the evidence, if they found the facts true. They accordingly found a general verdict of guilty, and the point was not afterwards stirred. I recollect also another case, so long ago as when the late Judge Trowbridge was Attorney-General. A man had been from this province into Rhode Island to purchase sheep. On his way home, while yet in their government, some other sheep joined his flock, and he drove them all into the County of Bristol, where he was indicted and convicted. Great mischiefs would follow from a contrary determination, which would also overthrow three solemn decisions of this court, which are now remembered; and I believe if our records were searched many more would be discovered. There have been many instances, I am satisfied, of persons who have stolen horses in the neighboring States, and, having been pursued and found in possession of them in this State, have been here indicted and convicted. The principle appears to me well established that the original taking being felonious, every act of pos-

session continued under it by the thief is a felonious taking; and wherever he carries the articles stolen, he may there be indicted, convicted, and punished for the felony.

The offence charged on the defendant is the receiving the goods in Boston, knowing them to have been stolen. If the principal could be tried and convicted in this county, the accessary may be tried and convicted here also.

The same reason which authorizes a conviction in the case of stealing goods in one county and bringing them into another applies, in my mind, to the case of stealing in one State and bringing them into another, namely, that every moment's felonious possession is, in contemplation of the law, a new taking, stealing, and carrying away.

Having respect then to principles, as well as to cases solemnly decided, I do not see sufficient ground for granting a new trial.

New trial refused.

PEOPLE *v.* WILEY,

3 HILL (N. Y.), 194.

CERTIORARI to the New York Oyer and Terminer, where the defendant was convicted, in December, 1841, of receiving certain personal property, knowing it to have been stolen. The property was described in the indictment as follows: "Ten promissory notes, commonly called bank notes, of the value, etc.; eleven bonds of the State of Maryland issued under an Act of the General Assembly of that State, at the December session, in the year 1838, each for £250 sterling, lawful money of Great Britain, with interest at 5 per cent., payable in London at any time after the expiration of fifty years from their date, and dated July 1, 1839, with coupons attached, which bonds were of the value of, etc., each; six other bonds of the State of Maryland for $1000 each, and of the value of, etc., issued under the Act of the General Assembly, etc., at the December session, 1834, bearing an interest, etc.; the goods, chattels, property, moneys, and effects of the President, directors and company of the Frederick County Bank, situate at Frederick, Maryland," etc.

The case was this: The bank was robbed between Saturday evening May 22, 1841, and the next Monday morning. Several of the bills stolen were notes of the bank, complete in form, but not issued. The instruments called "bonds" in the indictment ran thus: "Be it known, that there is due from the State of Maryland, two hundred and fifty pounds sterling, lawful money of Great Britain, payable," etc. [as in the indictment] with coupons attached, and with dates, times, etc., as

stated in the indictment. The other instruments described by the indictment as six other bonds, etc., were thus: "Be it known that the State of Maryland is indebted to J. J. Cohen, Jr., & Brothers, or bearer, $1000, being of stock created in pursuance of Chap. 241 of the acts," etc. They were all signed by the State commissioner of loans, and countersigned by the proper person, but not sealed; nor did they purport to be sealed, or exhibit any mark on them to represent a seal.

The thieves fled with the property to the city of New York; and on the 16th of June, 1841, the defendant, who was a police justice of the city of New York, wrote to the cashier of the bank (Mr. Doyle), saying that if the agents of the bank could have a personal interview with him, he had no doubt he could arrange matters in a manner that would be satisfactory, by a restitution of the loss. In consequence of this, Messrs. Beall and Tyler were sent to negotiate with the defendant, with full powers to act on the basis of the letter. They reached New York on Sunday night, the 20th of June. On Monday morning they opened the negotiation with the defendant, who said his employer was absent, and mentioned Thursday or perhaps Wednesday evening as the time when he might be able to attend to the business; he said also that the reward of 6 per cent. offered in a newspaper for the recovery of the property was not satisfactory to his employer; that the latter expected 10 per cent. On Wednesday evening the defendant told Messrs. Beall and Tyler his employer had returned and insisted on 10 per cent. He made various offers of the amount to be returned, — from $90,000 to $115,000, — said it was impossible to restore $125,000 or $124,000, the sum demanded by the agents of the bank, as the parties concerned had used a small portion of it. He fell to 8 per cent. as the reward; and the negotiation went on till it was finally agreed to restore $120,000, for 8 per cent. on that sum, he mentioning Friday, Saturday, Sunday, or Monday, as the time for making the restoration. He saw the agents of the bank occasionally till Saturday morning, when he said, "I am ready for you, you must come up to the scratch," and that he had provided a room up town where he would close the contract. They went to the place and he came there, accompanied by the clerk of his court and others to aid in counting the money. He brought a valise or small hand-trunk, saying, "There is the stolen property." The bonds were found, and the counting proceeded till the amount was ascertained and certified. Some gold had been stolen, which he said it was idle to talk of restoring, as gold was never restored in such cases. The agents paid him the 8 per cent., which amounted to $9809.52, in Maryland bank funds. For this he gave his receipt, expressing it to be "as a settlement upon the restoration of $122,619, of the issues of the Frederick County Bank." The transaction was closed on Saturday the 26th of

June, when the defendant and the agents exchanged receipts and discharges of that date. The bank never recovered any part of the gold.

The agents and others were examined and cross-examined at great length as to the above circumstances and various others connected with them. It appeared that in the course of the negotiation, the defendant advised caution, saying, "These thieves are scary birds."

Peter See, the defendant's clerk, was sworn as a witness for him; by whom the defendant's counsel, "in order to show the publicity given to his proceedings by the defendant prior to the receipt of the property in question, proposed to prove that the defendant, previously to Saturday the 26th of June, stated freely during the week that he expected shortly to obtain possession of the property which was stolen from the Frederick County Bank." This was objected to, on the ground "that even for the purpose proposed, the defendant could not give his own declarations in evidence." The Court sustained the objection, and the defendant excepted.

The Court charged the jury, 1. That the issues or promissory notes of the bank were the *personal property* of the bank, within the meaning of the statute on which the indictment was founded; and that the instruments called *bonds*, although *not sealed* or marked with an *L. S.*, were well described in the indictment. 2. That the articles were to be considered as stolen in this State, though first stolen in and brought from another, and so were capable of being criminally received here. 3. That, as to the section of the statute under which the prisoner stood indicted — namely, 2 Rev. Sts. 680, § 71 — a very literal construction should not be adopted; that it was the intent with which the stolen property was received that constituted the essence of the offence; that the property must have been received not only with knowledge, but with evil intent (*malo animo*), and this intent must have been either to wrong the Commonwealth or to wrong the owner,— that is to say, either to assist the felon in escaping detection, or to prevent detection or punishment, or to deprive the owner in whole or in part of his property; that, in accordance with this principle, if Wiley received the stolen goods at the request of the owners, and for the purpose of returning the goods to the owners, he was not guilty. 4. That if he received the property from the person who stole it, knowing it to have been stolen, with intent to extort from the bank a large reward for its restoration, and secretly retained it while he employed himself in efforts to extort such reward from the agents of the bank, and then delivered it to the bank on receiving the reward, he appropriating the latter to himself or dividing it with the felon, he was guilty. 5. If, however, he did not receive the stolen property till Saturday morning the 26th of June, and then received it at the request of the agents of the bank for the purpose of

delivering it to them in pursuance of the previous agreement between the agents and himself, and did so actually deliver it without delay, he was not guilty. But if, on the day mentioned; he received the stolen property, knowing it to have been stolen, with the view and intent, without the knowledge and consent of the owners or their agents, to appropriate to himself the reward agreed upon, or to divide it between himself and the felon, and if he did so appropriate or divide the reward, this would be a corrupt receiving of stolen property within the statute.

The defendant excepted to the first and second instructions contained in the charge, and "so much of the fifth as declared that, under the other circumstances supposed in said instructions, the defendant would still be guilty of the offence charged in case he had, in receiving the alleged stolen property, the motive of obtaining from the bank, either for his own benefit or that of the alleged thief, the reward agreed upon, and because of the reference by the court to a supposed ignorance or want of consent on the part of the owners to the appropriation of the reward, not alleged or attempted to be proved." On the argument in this court, the exception to the second instruction was waived.

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[A new trial was denied.]

Section 4. Distinction between Larceny from Thief and Receiving.

REGINA v. WADE,

1 C. & K. 739.

The prisoners Wade and Kenyon were indicted for having broken and entered the house of Thomas Worsley at Warrington, and having stolen therefrom one watch, two handkerchiefs, and other articles his property, the prisoner Leigh being indicted for receiving the watch and the handkerchiefs, knowing them to have been stolen.

The prisoners Wade and Kenyon pleaded guilty. The prisoner Leigh pleaded not guilty and was tried.

It was proved by the servant of a pawnbroker that the wife of the prisoner Leigh had pledged the stolen watch on a day subsequent to the robbery, and James Jones, a constable of Warrington, also proved that he had seen all the three prisoners together, they being in custody together at Manchester, when Leigh said that he had left Kenyon's house with Kenyon before the robbery, that he had afterwards gone to Dunham (about eight miles from Manchester) and returned. Leigh was

then discharged. But the witness subsequently went to Manchester again, and caused him to be again apprehended; and Leigh's wife then, in the presence of Leigh, told this witness that she had taken the watch and pawned it for 10*s*. She added that Leigh had also told her to take two handkerchiefs, and that, as she was about to go with them, a policeman came, and she left them in a cellar next door to her husband's house. Upon that information, the witness went to the cellar and found the handkerchiefs. Afterwards, when Leigh was in custody in the lockups with Wade, Leigh told the same witness that while he (Leigh) was before with Wade in the same place, Wade had told him (Leigh) that he had "planted" the watch and handkerchiefs under a flag in the soot-cellar in his (Leigh's) house; and that when he (Leigh) was discharged, as before mentioned, he had gone and taken the things, and had desired his wife to pledge the watch for as much as she could get upon it.

The watch and handkerchiefs were identified as the property of the prosecutor.

POLLOCK, C. B. I doubt whether, when the possession has been transferred by an act of larceny, the possession can be considered to remain in the owner. Were it so, then every receiver of stolen goods, knowing them to be stolen, would be a thief; and so on, in series from one to another, all would be thieves. If this was an act done by the prisoner (Leigh) in opposition to Wade, or against his will, then it might be a question whether it were a receiving. But if Leigh took the articles in consequence of information given by Wade, Wade telling Leigh in order that the latter might use the information by taking the goods, then it is a receiving.

Verdict, guilty.

SECTION 5. ACT OF RECEIVING.

REGINA *v.* SMITH,

1 DEARS. C. C. 494 [1855].

THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. Edwin James, Q. C., Recorder of Brighton.

At the Quarter Sessions of the Peace for the borough of Brighton, holden at the Town Hall in the said borough, before the Recorder of the borough, on the 8th day of May, 1855, the prisoner, Thomas Smith, was indicted for feloniously receiving a stolen watch, the property of John Nelson, knowing the same to have been stolen. It was

proved that John Nelson, the prosecutor, between eleven and twelve o'clock on the night of the 12th of April in this year, was in a public-house called the "Globe" in Edward Street in the said borough; he was in company with a prostitute named Charlotte Duncan, who lodged in a room of a house No. 17 Thomas Street, Brighton, which belonged to the prisoner, of whom she rented the room.

The prisoner and five or six other persons were present in the apartment in the Globe Inn when the prosecutor and Charlotte Duncan entered; while the prosecutor was drinking in the "Globe," his watch, being the watch named in the indictment, was taken from his person by some one who forced open the ring which secured the watch to a guard. The prosecutor heard the click of the ring and immediately missed his watch, and taxed the prisoner as the thief. A policeman was sent for and a partial search made, but the watch was not found. The prisoner was present all that time, and also a man named Hollands was present all the time. Soon after the loss of the watch the prosecutor and the girl Charlotte Duncan went together to Charlotte Duncan's room in Thomas Street. After they had been there together little more than an hour the prisoner came into the room where they were, and said to the prosecutor, "Was not you in the 'Globe,' and did not you lose your watch?" The prosecutor said, "Yes." The prisoner then said, "What would you give to have your watch back again?" Prosecutor said, "I'd give a sovereign." Prisoner then said, "Well, then, let the young woman come along with me, and I will get you the watch back again." Charlotte Duncan and the prisoner then went together to a house close by, in which the prisoner himself lived. They went together into a room in which Hollands was. This was nearly one o'clock. There was a table in the room; on first going in Charlotte Duncan saw there was no watch on the table, but a few minutes afterwards she saw the watch there. The prisoner was close to the table. She did not see it placed there, but she stated it must have been placed there by Hollands, as, if the prisoner to whom she was talking had placed it there, she must have observed it. The prisoner told Charlotte Duncan to take the watch and go and get the sovereign. She took it to the room in 17 Thomas Street, to the prosecutor, and in a few minutes the prisoner and Hollands came to that room. Hollands asked for the reward. The prosecutor gave Hollands half-a-crown, and said he believed the watch was stolen, and told him to be off. Hollands and the prisoner then left. The prisoner did not then say anything, nor did the witnesses see him receive any money. Hollands absconded before the trial. The recorder told the jury that, if they believed that when the prisoner went into the room 17 Thomas Street and spoke to the prosecutor about the return of the watch and

took the girl Duncan with him to the house where the watch was given up, the prisoner knew that the watch was stolen; and if the jury believed that the watch was then in the custody of a person with the cognizance of the prisoner, that person being one over whom the prisoner had absolute control, so that the watch would be forthcoming if the prisoner ordered it, there was ample evidence to justify them in convicting the prisoner for feloniously receiving the watch. The jury found the prisoner guilty, and, in answer to a question from the recorder, stated that they believed that, though the watch was in Hollands' hand or pocket, it was in the prisoner's absolute control.

Sentence was passed on the prisoner, but was respited until the opinion of the Court could be taken.

The question for the opinion of the Court is, if the conviction of the prisoner is proper.

This case was argued on the 2d day of June, 1855, before Lord Campbell, C. J., Alderson, B., Erle, J., Platt, B. and Crowder, J.

No counsel appeared for the Crown.

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Lord Campbell, C. J. I think that the conviction was right. In the first place the direction of the learned recorder was unexceptionable. According to the decided cases as well as to the dicta of learned judges, manual possession is unnecessary. If we were to hold a contrary doctrine, many receivers must escape with impunity. Then it has been held in decided cases, including Regina *v.* Wiley,[1] that there may be a joint possession in the receiver and the thief; that is the *ratio decidendi* on which the judgment in that case proceeds. Then, was not there ample evidence to justify the jury in coming to the conclusion at which they arrived? I think there was. They might, it is true, have drawn a different conclusion, and have found that Smith was the thief; and if they had drawn that conclusion, he would have been entitled to an acquittal. Another inference which they might have drawn, and which would also have resulted in a verdict of not guilty, was, that Hollands being the thief, the watch remained in his exclusive possession, and that the prisoner acted as his agent in restoring the watch to the prosecutor; but the jury have come to a different conclusion, and I think they were justified in so doing. We have instances in real life, and we find it represented in novels and dramas drawn from real life, that persons are employed to commit larcenies and so deal with the stolen goods that they may be under the control of the employer. In this case Hollands may have been so employed by the prisoner, and the watch may have been under the prisoner's

[1] Below, p. 445.

control, and if so, there was evidence of a possession both by Hollands and the prisoner.

ALDERSON, B. There was abundant evidence from which the jury might come to the conclusion at which they arrived, although there was evidence the other way.

ERLE, J. The doubt in these cases has arisen as to the meaning of the word "receive," which has been supposed to mean manual possession by the receiver. In Regina v. Wiley, Patteson, J., says, that a manual possession, or even a touch, is not essential to a receiving, but that there must be a control over the goods by the receiver. Here the question of control was left to the jury, and they expressly found that though the watch was in Hollands' hand or pocket, it was in the prisoner's absolute control.

PLATT, B. There was some evidence that the prisoner might have been the thief, and the prosecutor charged him with being the thief; but a search was made and the watch was not found, and it was proved that Hollands absconded before the trial; from that and the other facts of the case, the jury might well find that Hollands was the thief and the prisoner the receiver.

CROWDER, J. I also think that both the direction and the conviction were right. There was sufficient evidence that Hollands was the thief. The question is then put to the jury, Was the watch under the control of the prisoner? And they say it was. That finding is sufficient to support their verdict, and the conviction was right.

Conviction affirmed.

REGINA v. WILEY,

4 Cox C. C. 412 [1850].

AT the Northumberland Quarter Sessions, holden at Newcastle-upon-Tyne, on the 26th of July, 1850, Bryan Straugham, George Williamson, and John Wiley were jointly indicted for stealing and receiving five hens and two cocks, the property of Thomas Davison. It was proved that on the morning of the 28th day of January, at about half-past four o'clock, Straugham and Williamson were seen to go into the house of John Wiley's father with a loaded sack that was carried by Straugham. John Wiley lived with his father, in the said house, and was a higgler attending markets, with a horse and cart. Straugham and Williamson remained in the house about ten minutes and were then seen to come out of the back door, preceded by John Wiley with a candle, Straugham again carrying the sack on his shoulders, and to go into a stable be-

longing to the same house, situate in an enclosed yard at the back of the house, the house and stable being on the same premises. The stable door was shut by one of them, and on the policemen going in they found the sack lying on the floor, tied at the mouth, and the three men standing round it as if they were bargaining, but no words were heard. The sack had a hole in it, through which poultry feathers were seen protruding. The bag when opened was found to contain six hens, two cocks, and some live ducks. There were none of the inhabitants up in the house but John Wiley, and on being charged with receiving the poultry, knowing it to be stolen, he said he did not think he would have bought the hens. The jury found Straugham and Williamson guilty of stealing the poultry laid in the indictment, and John Wiley guilty of receiving the same, knowing it to have been stolen. The bench told the jury that the taking of Straugham and Williamson, with the stolen goods, as above by Wiley, into the stable over which he had control, for the purpose of negotiating about buying them, he well knowing the goods to have been stolen, was a receiving of the goods within the meaning of the statute. The bench, however, submitted a question to this court, whether under the circumstances the conviction of Wiley was proper. The three prisoners were again jointly indicted for stealing and receiving the nine ducks which were found in the sack above mentioned, and upon the same evidence and upon the same direction by the bench the jury again found Straugham and Williamson guilty of stealing and Wiley guilty of receiving the nine ducks, knowing them to have been stolen, and the bench reserved a similar question for the consideration of this court on this indictment.

This case was first argued on Saturday, April 27, before Lord Campbell, C. J., Parke, B., Alderson, B., Cresswell, J., and Erle, J.

Otter, for the prisoner. The earlier statutes made it felony to buy or to receive; but the 7 & 8 Geo. IV. c. 29, § 54, does not contain the word "buy;" and the buying of stolen goods is not now a felony, unless the goods are actually received into the possession of the buyer.

The negotiation, therefore, between the thieves and Wiley has no weight. There cannot be a joint possession of thief and receiver, any more than of buyer and seller; the possession of one is antagonistic to that of the other. R. *v.* Parr, 2 Moody & R. 346. An actual receipt is necessary to make out a case of civil liability within the Statute of Frauds. Farina *v.* Home, 16 M. & W. 119. Hill's Case, 1 Den. C. C. 453, is also in point, because here the property never was actually or "potentially" in the possession of Wiley.

Liddell, contra. There was evidence for the jury of a possession by Wiley. He materially assisted in removing the stolen property into the stable, and he had first of all received it into the house. 2 East,

P. C. 765; R. v. Davis, 6 C. & P. 178; Richardson's Case, 6 C. & P. 335. A constructive possession is enough; and Hill's Case only introduces a difficulty by using the word "potential," the exact meaning of which it is not very easy to define. It is quite immaterial that the house belonged to the prisoner's father. R. v. Gruncell, 9 C. & P. 365.

Otter in reply cited R. v. Wilkins, 1 Leach, 522.

Cur. adv. vult.

By the direction of the judges, the case was re-argued on Tuesday, November 26, before LORD CAMPBELL, C. J., PARKE, B., ALDERSON, B., PATTESON, J., COLERIDGE, J., MAULE, J., CRESSWELL, J., ERLE, J., PLATT, B., WILLIAMS, J., TALFOURD, J., and MARTIN, B.

Otter, for the prisoner. By taking the thieves with the stolen property into the stable, the prisoner might perhaps have been indicted as an accessary at common law. [PARKE, B. I doubt that, unless it was done to facilitate their escape.] At all events that is an offence quite different from the one charged; for to make him an accessary, he must receive the felon. 1 Hale, P. C. 618, 619, 620. The early statutes upon this subject apply to persons "buying or receiving" stolen property. 1 Anne, Stat. 2, c. 9, § 2; 5 Anne, c. 31, § 5; 25 Geo. II. c. 10, § 3; 21 Geo. III. c. 69, § 1; but in 7 & 8 Geo. IV. c. 29, § 54, the word "buy" is left out, and "receive" stands alone; the inference therefore is that a buying, still less a bargaining for goods, is not enough, unless they are actually received. The question turns upon the meaning of the word "receive." Now, with regard to stolen goods, the property and the constructive possession remain in the owner, from whom they have been stolen; the thief has no more than the actual possession; and if he does not part with that, he parts with nothing. He can give the receiver nothing but the actual possession; and the moment he gives that, he ceases to have any possession of any kind. Fyson v. Chambers, 9 M. & W. 460. In Armory v. Delamirie, 1 Stra. 505, the plaintiff obtained possession lawfully; but if an unlawful possession is lost, trover cannot be maintained. Such being the situation of the thief and receiver, in order to constitute a receiving there must be a willing parting with the possession on the part of the thief and a willing taking of possession on the part of the receiver. [LORD CAMPBELL, C. J. May there not be a joint possession by the thief and receiver?] It is submitted that there cannot; for the possession of the thief is antagonistic to that of the receiver. In R. v. Wade, 1 C. & K. 739, it appeared that W. had stolen a watch from A.; and while W. and L. were in custody together, W. told L. where he had "planted" it. Upon L.'s discharge, he went to the place and took the watch; upon which Pollock, C. B., said, "If this was an act done by the pris-

oner (L.) in opposition to W., or against his will, then it might be a question whether it would be a receiving." [ALDERSON, B., referred to R. *v.* Hill, 1 Den. C. C. 453; 3 Cox C. C. 533.] That case shows that no constructive receipt is sufficient. [LORD CAMPBELL, C. J. The expression is "possession actual or potential;" it implies therefore that there may be a sufficient possession without corporal touch. MARTIN, B. What is meant by "potential possession"?] It means at least that it should be accompanied with a disposing power; it cannot mean a constructive possession, because in that case the prisoner had a constructive possession of the stolen property by the delivery to the carrier for her. [ALDERSON, B. There must be actual possession; but two people may have actual possession at the same time.] Regina *v.* Parr, 2 Moody & R. 346, is an authority against the notion of a joint possession by thief and receiver. In the present case, Wiley never had manual possession of the stolen goods; and it is clear that the thieves did not intend to part with the possession without payment, or at all events until the bargain was complete. [LORD CAMPBELL, C. J. Suppose the bargain had been completed, but the policeman came in while the parties remained in *statu quo?* PARKE, B. You say that there must be a giving by the thieves?] Yes. [ALDERSON, B. It is consistent with the direction of the chairman that the thieves kept possession all the time. PARKE, B. Yes, it considers the simple act of taking the thieves with the goods into the stable a receiving.] Suppose that Wiley had knocked down the thieves and taken the stolen property from them, might he not have been indicted for stealing them? Would there not have been a sufficient possession by the thieves to maintain trespass? Purnell *v.* Young, 3 M. & W. 288; Ashmore *v.* Hardy, 7 C. & P. 501. If the price had not been agreed, the thieves might and would have taken the goods away. The prisoner had still a *locus penitentiæ*. [PATTESON, J. If the goods were left for several hours in Wiley's house with his permission, he might be guilty of receiving, though the thieves afterwards took them away.] That would be a very different case. Here they were not left by the thieves at all.

Liddell, contra. The direction of the chairman imports all the facts previously stated up to the apprehension of the prisoners; because the expression is, taking the thieves "as above." In the argument for the prisoner, a constructive possession *per alium* has been confounded with a joint actual possession by two. In R. *v.* King, Russ. & Ry. 332, goods had been removed from the possession of the prosecutor by A., in the absence of B., and B. afterwards joined in carrying them away; it was held that B. could not be convicted of stealing; and in 2 Russ. on Crimes, 240, the case is classed as a case of receiving. It is doubt-

ful whether mere naked possession will support either trespass or trover, so that test fails; but the real question is, Had the prisoner actual or potential possession? [LORD CAMPBELL, C. J. If a man knowingly receives stolen goods *malo animo*, is he not a receiver within the statute?] That is the definition in 2 East P. C. 766; and actual does not necessarily mean manual possession. If a letter is dropped into a letter box, it is in the possession of the owner of the box; he has the power of taking it into his manual possession at any moment. Here Wiley exercised a control over the goods. [LORD CAMPBELL, C. J. Suppose that he had assisted in carrying the bag?] In that case he would clearly be guilty of receiving. [LORD CAMPBELL, C. J. Then, does it make any difference, the three being engaged in a joint act, which carries the bag and which the candle?] Not the least. Under the Stat. 2 Will. IV. c. 34, §§ 7 and 8, it has been decided that a possession of counterfeit coin by one of two persons is the joint possession of both, if they were acting in concert, and both had knowledge of the possession. R. *v.* Rogers, 2 Moody C. C. 85; R. *v.* Gerrish, 2 Moody & R. 219. Then "receive" and "have in possession" are convertible terms. Cole's Case, 2 East P. C. 767. [ERLE, J. That case shows that they are not convertible terms. LORD CAMPBELL, C. J. Was not Wiley as much in possession as the other two?] He had a "potential" possession. [LORD CAMPBELL, C. J. I wish that word had not been used. It has no definite legal meaning.] It is satisfied, at all events, if the prisoner has the physical power of taking manual possession. [COLERIDGE, J. If "as above" imports into the direction of the chairman all that had been previously stated, your argument may be well founded; but it is an odd expression.] If that is not so, there is no case against Wiley at all, because he may have taken the men into the stable quite innocently. The chairman must be understood as speaking with reference to all the circumstances of the case; otherwise why are they all stated? The different statutes which have been referred to were passed with the intention of enlarging the definition of an accessary after the fact; but, unless this is a receiving within the statute, the effect will have been to narrow instead of enlarge it.

Otter, in reply. The conviction cannot be sustained if it is doubtful in whose possession the goods were. R. *v.* Gerrish affords no assistance in interpreting the word "receive," upon which this question turns. In that case the joint possession would convict both of the same offence; but it would be a strange consequence if a joint actual possession by two should be sufficient to convict one of the offence of stealing and the other of that of receiving. The direction of the chairman excludes from the consideration of the jury all that occurred in

the stable. [CRESSWELL, J. Suppose B. is in danger of being captured, and C. knowing that B. is carrying stolen goods, conceals him in his house, does he feloniously receive the goods?] He does not. [PARKE, B. You say that there must be a receipt of the goods independent of the receiving of the thief.] Yes, if a lodging-house keeper is asked to buy a stolen watch, and says, "Sleep here, and I'll tell you in the morning," is he guilty of receiving stolen goods, though in the morning he may say, "I will have nothing to do with it"? [PARKE, B. He who receives a thief is not an accessary unless he does it with a view to assist the thief in eluding justice. LORD CAMPBELL, C. J. Instead of a watch, put the case of a hamper. Suppose A. brings a hamper to B.'s house, and says, "I have stolen this, will you keep it for me till the morning," and B. consents, is he not a receiver of stolen goods?] That would depend upon whether the thief parted with the possession of it. If the thief left it, he probably would be held a receiver; but if the thief remained with it all night, and he only received the goods and the thief together, it is submitted that he would not.

Cur. adv. vult.

The learned judges retired to consider the case, and after some interval returned into court, and differing in opinion, delivered their judgments *seriatim*.

MARTIN, B. I am of opinion that this conviction is wrong. The question turns upon the construction of the Stat. 7 & 8 Geo. IV. c. 29, § 54, which enacts "that if any person shall *receive* any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law, or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such *receiver* shall be guilty of felony;" and I apprehend that the true rule of construction is laid down in the case of Becke *v.* Smith, 2 M. & W. 195, by Parke, B., who says: "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further." Now the question is, What is the meaning of the word "receive" as applied to the facts of this case? I understand the facts to be these. Two men stole some fowls, which they put into a sack, and carried to the house of Wiley's father, for the purpose of selling them to Wiley. All three went together from the house to an outhouse; the bag was carried on the back of one of the thieves; and when the policeman went in, the sack

was found lying on the floor unopened, and the three men around it as if they were bargaining, but no words were heard. Now I am of opinion that Wiley, under those circumstances, never did receive those fowls. I entirely agree that the question arises upon the possession; there is no question of property here, for that remained in the original owner; but it seems to me that the two men had the stolen articles in their possession as vendors adversely to Wiley; and that they never intended to part with that possession unless some bargain was concluded for the purchase of them. Upon this ground I am of opinion that Wiley never did "receive" the goods in the ordinary and proper sense of that word, and I think it is exceedingly important that offences should be so broadly and clearly defined that all persons may understand what is the offence with which they are charged.

TALFOURD, J. I am also of opinion that this conviction is wrong. The question turns on the word "receive" as applied to the facts of this case; and it seems to me that the magistrate gave an improper direction to the jury on that subject, because he told them that the taking by Wiley of the two thieves with the stolen goods in the manner stated, to a stable over which he had control, for the purpose of trafficking as to the purchase of the stolen property, was a receiving within the statute; and I think it was not. The persons asserting the right of possession at that time were the two thieves; and the position of Wiley, as a person negotiating for the purchase, excludes the idea of his having any possession. There was still for him a *locus penitentiæ;* he might still have determined not to take the fowls; and the whole matter was, I think, inchoate and incomplete.

WILLIAMS, J. I am of opinion that this conviction is right. I think that the charge was made out against Wiley, if the jury were satisfied that he had possession of the property, knowing it to be stolen, with a corrupt and wicked mind. In this case there is no doubt as to his knowledge, or as to the corrupt and wicked mind; and the only question is, whether he had possession. Now, it appears to me that he had a common purpose with Straugham and Williamson of carrying the stolen goods from the house to the stable; and to effectuate that purpose it was necessary that one or more of them should have manual possession of the goods. Accordingly, one hand carried the sack; and that was not Wiley's; but as the three had a common purpose, I think that they were all agents of one another, and that the possession of the man who had the fowls was the possession of the prisoner.

PLATT, B. I concur in opinion with my brothers Talfourd and Martin, and think the conviction wrong. In order to convict Wiley as a receiver of stolen goods, I think that it was necessary to show that he actually received the goods, that is, that they were in such a position

as to be under his dominion, exclusive of that of the thieves. If it was to be taken that, while the sack was carried from the house to the stable, and Wiley was lighting the carrier, the goods were in the joint possession of the three at that time, this difficulty must arise, — that the same act which constituted the joint possession by the hand of one of them would be a felonious *asportavit* by the one, and a felonious receiving by the other; the very same act would convict the two of entirely different offences. I think that cannot be; and that as no bargain had been begun at that time, and the thieves retained the control and possession of the goods, — not a legal possession, of course, but the actual possession, — and as there was no intention on the part of the thieves of parting with the property, unless a bargain was made, it would be much too strong to say that a party who only contemplated becoming the possessor if a bargain could be completed, was a receiver within the statute. Therefore, in my opinion, the direction of the chairman was wrong.

Erle, J. I am of opinion that the conviction was right on two grounds. First, upon the facts found and left to the jury, I think that Wiley co-operated with the thieves in removing the stolen property from the house to the stable, which was under his control, for the purpose of more securely bargaining and evading the officers of the law. If Wiley had actually taken part in carrying the goods, I believe in the minds of many of the judges there would be no doubt that he had had a joint possession with the thieves, which would be sufficient to convict him of the present charge; and as he accompanied them, and lighted them to the stable, I think he did co-operate with them in transporting the goods as much as if he had helped to carry them. I found my opinion on the law, which has often been laid down, that where goods are stolen, and the removal from the owner's premises is complete, and the thief afterwards procures somebody to assist him in removing them again to a place of greater security, the person who so removes them is not liable to be convicted of larceny, because by the first removal the larceny was complete. A person who so co-operates is certainly a criminal within the intention of the law, and I think that the law is strong enough to reach him as a receiver of stolen goods. That is one ground of my opinion; but I also attach a wider meaning to the word "receive" than some of my learned brothers are disposed to give to it. It appears to me that, with reference to acts of felonious receiving or taking, the rules of the civil law relating to possession have no application.[1] Originally the person who received and assisted a

[1] The correct use of the term "possession" requires extensive and precise knowledge, and the introduction of the term into the description of a felony would give complexity and not clearness to the criminal law. (See Von Savigny on Possession by Sir Erskine Perry.)

thief, after he had committed a larceny, was held to be an accessary after the fact; but then several statutes were passed, in consequence of the imperfect state of the law, which only rendered a person punishable who harbored the thief. By those statutes the guilty receipt of the stolen property was made punishable; and I think that the word "receive," as applied to the goods, ought to be construed with reference to the other offence of harboring the thief. If a man harbors a thief with a view in any way to assist his escape, he is guilty; and so, I think, if he harbors the goods for the purpose of assisting the thief, he is guilty of a felonious receiving within the meaning of the statute. If the owner of a stable authorizes thieves to deposit in that stable stolen goods, he is guilty of receiving them. That proposition by itself would probably not be contested; and I think that, if he authorizes the thieves to go into the stable with the stolen goods, he is not the less a receiver because the thieves stay with the property. The earlier statutes clearly did not contemplate a bargain or consent to the transfer of the stolen property as essential to the offence of receiving; for both in the 29 Geo. II. c. 30, and 2 Geo. III. c. 28, the crime of receiving is expressed thus: "Every person who shall privately buy or receive any stolen lead, &c., by suffering any door, window, or shutter to be left open or unfastened between sun-setting and sun-rising, for that purpose;" so that the offence there contemplated involved no communication with the thief at all after he had possession of the stolen goods, but applied to the practice of leaving open a place of deposit previously known to the thieves. Such a case is certainly within the mischief of the statute; and in 2 East P. C. 765 it is expressly laid down "that in order to constitute a receiver, generally so called, it is not necessary that the goods should be actually purchased by him; neither does it seem necessary that the receiver should have any interest whatever in the goods; it is sufficient if they be in fact received into his possession in any manner *malo animo*, as to favor the thief;" and the same law is to be found in 2 Russ. on Crimes, 247, where several authorities are cited. It is there said: "If the prisoner received the property for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased it." Per Taunton, J., R. *v.* Richardson. It seems to me, therefore, that the statute contemplated precisely such a taking as is proved in this case. With respect to the latter ground of decision, I take into consideration the facts that the goods were taken into the stable, and were found lying on the ground there in the manner stated.

CRESSWELL, J. I agree with those of the judges who think the conviction right. The direction of the chairman is the matter to be looked at; and the words "as above" embody in the summing up the

manner in which the goods were taken to the stable. Wiley carried the light, and he therefore assisted in the removal of the goods to the stable. If the goods had been carried by the thieves from one part of the owner's premises to another but not finally taken away, and the prisoner Wiley had afterwards been called in to assist in removing them off the premises, he would undoubtedly have been guilty of larceny; there would have been a sufficient *asportavit* by him, and he would therefore have had a joint possession in so removing them. Substituting then for the deposit on the premises of the original owner a deposit elsewhere, the prisoner who assists in the removal of them must equally have a joint possession during that removal; and knowing them to be stolen, he is, I think, while he is engaged in that act, a felonious receiver. If it were necessary, I should be also inclined to put the larger construction on the word "receive" suggested by my brother Erle.

MAULE, J. I think that this conviction is wrong.

COLERIDGE, J. I also think the conviction wrong. We must decide this case upon the direction given by the chairman at Sessions, which, if construed strictly, might confine the case to the mere fact of leading the thieves to the stable; but I think it is far better and more convenient to treat it as including all the circumstances stated upon the case. Looking then at the circumstances, it is to be observed that the case states no previous invitation by the prisoner, or communication between him and the thieves; but he is in his father's house with the thieves, and he helps them to convey the goods to the stable, with, it may be assumed, the guilty purpose of buying, and so obtaining possession of the stolen property, upon a contingency which never happened. Until some bargain had been concluded, he never intended to take charge of it, nor in fact, could he have taken possession. This therefore is not a case of joint constructive possession; nor did the thieves intend to admit him to any actual possession except upon a bargain which was never made. The charge of receiving must import possession, actual or constructive; and in this case I can find neither one nor the other. I entirely concur with my brother Martin in thinking that, in administering the process of the criminal law, we ought to go on broad grounds of construction, intelligible to ordinary people.

PATTESON, J. Upon the whole, I am of opinion that this conviction is wrong. I do not mean to say that it is necessary, in order to constitute a receiving, that the prisoner should in every case actually touch the stolen property, or that there may not be cases of joint possession by the thief and receiver in which a conviction would be proper; but I think that there must be such circumstances in the case as will show

that the stolen property was under the control or power of the receiver either jointly with or separately from the thief; and in my opinion there is an absence of such circumstances in this case. Here the property was all the time in the manual possession of the thieves; Wiley conducted them to a place where it was proposed to bargain for the purchase, but he is apprehended before the sack is opened, or anything done. How far the fact that the sack was found lying on the floor of the stable and the three men round it might have justified a conviction, I cannot inquire, because the chairman directed the jury that the taking into the stable was in itself a receiving; but I incline to think that fact would not have fixed the prisoner, because it was not intended that the goods should be taken by him until a bargain had been made.

ALDERSON, B. I agree with the majority of the court. There is nothing to show that the goods were ever out of the manual possession of the thieves. I agree that there may be a joint possession by the thief and receiver; and if the stolen articles had ever been out of the manual possession of the thieves, and had then been jointly conveyed by the three, Wiley might have been liable to be found guilty as a receiver; but here the thieves take the goods into the house; it does not appear what took place in the house; then they come out, and Wiley admits them into a stable under his control. There is nothing to show that, before they went into the house, there was any previous communication. Now, those are all the facts which were left to the jury in this case, and I think that they were not sufficient for the purpose. The prisoner never had possession; he intended to bargain for the property and to take possession if the bargain was completed, but he never did so. There must in these cases be a dividing line, which it is always difficult to define with accuracy; but I think in this case the dividing line was not reached, and that the bench laid down an inaccurate rule to guide the jury.

PARKE, B. I also think the conviction wrong. It is our duty to confine ourselves to the case submitted to us; and the question reserved is whether the conviction is right, the bench having told the jury "that the taking of Straugham and Williamson with the stolen goods, *as above*, by Wiley into the stable, over which he had control, for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, was a receiving of the goods by him within the meaning of the statute." We are not to speculate whether the three were *participes criminis;* the word "receive" must be understood in its ordinary signification, and must mean a taking into possession, actual or constructive. Here, I think, there is no proof that the property ever got into the possession of Wiley at all; certainly none by his taking

Williamson and Straugham into the stable. He never touched the goods, and they never intended to part with the possession of them except upon the contingency of his becoming a purchaser, which did not happen. The only question is, whether by letting the thieves with the goods into the stable, he received the goods. I think that there must be a receiving of the goods into possession as distinct in some way from the receiving of the thief; and that the receiving of the thief with the goods into a house is not a receiving of the goods within the statute, in a case like this, any more than it would be in the case of a thief received into a house with a stolen watch in his pocket.

Lord Campbell, C. J. I agree with those of the judges who think the conviction right, and concurring in their reasons, I have little to add. I think that there is a receiving within the statute wherever a person, knowing goods to be stolen, has possession of them for a bad purpose. It is wholly immaterial whether he has any property in them; and if we look to analogies derived from the Statute of Frauds, or the rules relating to actions of trespass or trover, our judgment is likely to be misled. The material question is, whether there has been a possession *malo animo;* and all the judges, I believe, are of opinion that there may be a sufficient possession, though there is not a manual possession. Now, what are the facts from which it may be said that Wiley had possession? The sack was brought to his father's house, and he enters into a common purpose with the thieves of carrying the goods from the house to the stable, over which he had control, for the purpose of bargaining, and that was an illegal purpose. Then had not Wiley possession for that purpose? The thieves had no intention of then finally parting with the possession; but they had the common purpose of carrying the goods into the stable. Straugham carried the sack; but the possession of Straugham was also the possession of Williamson, and if of Williamson, why not of Wiley also? he went before with the candle. Suppose he had assisted in the very act of carrying it, would he not have had possession? And does it signify what part each took in carrying out the common purpose? No doubt there may be a joint possession by the thieves and the alleged receiver; and it seems to me that, during that removal, Wiley certainly had such a joint possession of the stolen property; but I cannot stop there. Upon a fair construction of this case, I think that the whole transaction was laid before the jury, and that we are to express our opinion upon the whole case. Then, what follows? The sack is found lying in the stable, no one touching it; it is not in the actual manual possession of any one of the three, but in my opinion, quite as much in the possession of Wiley as of the others. I cannot say that there can be no possession by the receiver unless the thieves had intended permanently

to part with the possession; and so I think the verdict warranted by the evidence of what occurred in the stable.

Conviction reversed.

REGINA *v.* WOODWARD,

9 Cox C. C. 95 [1862].

COURT OF CRIMINAL APPEAL.

CASE reserved for the opinion of the Court of Criminal Appeal. At the Quarter Sessions of the Peace for the County of Wilts, held at Marlborough, on the 16th day of October, 1861, before me, Sir John Wither Awdry, Bart., and others my fellows, Benjamin Woodward, of Trowbridge, in the County of Wilts, dealer, was found guilty of receiving stolen goods, knowing them to have been stolen, and was thereupon sentenced to nine calendar months' imprisonment with hard labor, and the prisoner now is undergoing his sentence.

The actual delivery of the stolen property was made by the principal felon to the prisoner's wife, in the absence of the prisoner, and she then paid 6*d.* on account, but the amount to be paid was not then fixed. Afterwards the prisoner and the principal met and agreed on the price, and the prisoner paid the balance.

Guilty knowledge was inferred from the general circumstances of the case.

It was objected that the guilty knowledge must exist at the time of receiving, and that when the wife received the goods the guilty knowledge could not have come to the prisoner.

The Court overruled this objection, and directed the jury that until the subsequent meeting, when the act of the wife was adopted by the prisoner and the price agreed upon, the receipt was not so complete as to exclude the effect of the guilty knowledge.

If the Court shall be of opinion that the circumstances before set forth are sufficient to support a conviction against the prisoner for the felonious receipt, the conviction is to stand confirmed; but if the Court shall be of a contrary opinion, then the conviction is to be quashed.

J. W. AWDRY.

. . . . . .

ERLE, C. J. The argument of the learned counsel for the prisoner has failed to convince me that the conviction was wrong. It appears that the thief brought to the premises of the prisoner the stolen goods

and left them, and that sixpence was paid on account of them by the prisoner's wife, but there was nothing in the nature of a complete receipt of the goods until the thief found the husband and agreed with him as to the amount, and was paid the balance. The receipt was complete from the time when the thief and the husband agreed; till then the thief could have got the goods back again on payment of the sixpence. I am of opinion therefore that the conviction should be affirmed.

Blackburn, J. The principal felon left the stolen property with the wife as the husband's servant, but the Court below, as I understand the case, doubted whether the husband could be found guilty of feloniously receiving, as he was absent at the time when the goods were delivered to the wife, and could not then know that they were stolen. It is found that, as soon as the husband heard of it, he adopted and ratified what had been done, and that as soon as he adopted it he had a guilty knowledge; he therefore at that time received the goods knowing them to have been stolen.

Keating, J. I am of the same opinion. The case finds that the agreement as to the price was not complete till the thief and the husband agreed. I think therefore that the receipt was not complete till then, and that the conviction was right. If we were to hold that the conviction was not right, the consequences would be very serious.

Wilde, B. I read the case as showing that the wife received the goods on the part of the prisoner her husband, and that act of her was capable of being ratified on the part of the prisoner. If so, that makes the first act of receiving by the wife his act. In the case of Regina *v.* Dring and Wife, the only statement was "that the husband adopted his wife's receipt," and the Court thought the word "adopted" capable of meaning that the husband passively consented to what his wife had done, and on that ground quashed the conviction. But here the prisoner adopted his wife's receipt by settling and paying the amount agreed on for the stolen goods.

Mellor, J., concurred. *Conviction affirmed.*

REGINA *v.* ROGERS,

37 L. J. M. C. 83 [1868].

CROWN CASE RESERVED.

Case reserved by the learned Assistant Judge for Middlesex.

John Rogers, Richard Irwin, Alfred Johnson, and Charles Byatt

were tried before me at the Sessions for Middlesex, on the 3d of March, 1868, for stealing and receiving a watch, the property of John Shaw. Byatt pleaded guilty; Rogers was found guilty of stealing; and Irwin and Johnson were found guilty of receiving with a guilty knowledge.

John Rogers resided at Liverpool, and forwarded by railway a box containing the watch in question and several other stolen watches to the prisoner Byatt, and the box was delivered in due course to Byatt, in the County of Middlesex. The box was addressed to his house in the handwriting of Rogers, and a similar box, empty, with similar address in Rogers's handwriting, was found at Byatt's. That box was taken by Rogers to the railway office in Liverpool on the 13th of January and booked as a parcel for London. Rogers was asked if he wished to pay the carriage, and he did so. The box was then forwarded in the ordinary manner. The box containing the articles named in the letter set out in the case (and among them the stolen watch in question) was sent by railway in the same manner on the 30th of January at ten o'clock in the morning, but the railway clerk could not say by whom it was brought to the office. The watch in question was stolen from the owner at Liverpool on the 29th of January about seven P. M. It was contended that as Rogers was not shown to have left Liverpool, the Court had no jurisdiction to try him. I told the jury that if they believed Rogers to have stolen the watch, his transmission of it into the county by the agency of the railway was sufficient to give the Court jurisdiction, although he did not personally convey it.

It was proved that Rogers had advised Byatt of the transmission of the box by a letter found in Byatt's possession, which letter was as follows: —

LIVERPOOL, Jan. 30, 1868.

I send you up the goods this morning. They are as follows: —

	£.	s.
13 W. Leavers	15	12
4 W. Genevas	1	12
1 R. Leaver	6	0
1 R. Geneva	1	5
1 Red Case, 1 oz. 2 dwts.	1	5
1 Red Slang, 1 oz. 17 dwts.	2	5
Ditto 1 oz. 2 dwts.	1	7
	29	6

Try and deal this time without so much wrangling; you did not come down as you promised.

DICK.

Articles corresponding with this letter were contained in the box found at Byatt's.

Irwin and Johnson were proved to have been at Byatt's house on the arrival of the box, and the jury found that they knew of the box and the contents having been forwarded by Rogers, and that they were present on its arrival, aiding and abetting Byatt in the receipt of the watch in question, they well knowing it to have been stolen; but it was not proved that either of them had manual possession of it, all the prisoners, Byatt, Irwin, and Johnson, having been taken into custody before the box was opened. I have to ask this honorable Court whether, upon the facts here stated, the conviction of Rogers, Irwin, and Johnson, or either of them, can in point of law be sustained.

. . . . . .

KELLY, C. B. With regard to the conviction of Rogers, the facts were, that the watch was stolen by him at Liverpool and forwarded by railway to Byatt in Middlesex, for the purpose of being sold and disposed of by him there. The question is, whether the possession of the watch, in contemplation of law, remained with Rogers. I think the authority cited to us is conclusive. Constructive possession is deemed equivalent to actual possession in criminal as well as civil cases; and here Rogers must be deemed to have retained the control over the article. Then, possession being thus retained by him, his conviction must be affirmed. Then, as to Irwin and Johnson, the jury have found that they knew of the box having been forwarded by Rogers, and that they were present on its arrival, aiding and abetting Byatt in the receipt of the watch, they well knowing it to have been stolen. Aiders and abettors in a felony can be indicted, tried, and convicted as principals; therefore, as to them, the conviction must also be affirmed.

The rest of the judges agreed. *Conviction affirmed.*

SECTION 6. SUCCESSIVE RECEIVINGS: RECEIVING FROM A RECEIVER.

STATE *v.* IVES,

13 IREDELL, 338 [1852].

APPEAL from the Superior Court of Law of Currituck County, at the fall term, 1851, his honor Judge Settle presiding.

The defendant was indicted for receiving stolen goods, and was convicted upon the following counts in the bill of indictment: —

5th count. And the jurors, etc., do further present, that the said Josiah Ives, afterwards, to wit, on the 1st day of February, A. D.

1851, in the county aforesaid, with force and arms, one bale of cotton, of the value of ten shillings, and one barrel of tar, of the value of six shillings, of the goods and chattels of said Caleb T. Sawyer, before then feloniously stolen, taken, and carried away, feloniously did receive and hire, he, the said Josiah Ives, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

6th count. And the jurors, etc., do further present, that, at and in the county aforesaid, on the 1st day of March, 1851, certain goods and chattels, to wit, one bale of cotton, of the value of ten shillings, and one barrel of tar, of the value of six shillings, of the goods and chattels of Caleb T. Sawyer, feloniously were stolen, taken, and carried away, by some person to the jurors unknown; and that the said Josiah Ives, afterwards, to wit, on the 2d day of March, 1851, in the county aforesaid, the said bale of cotton and the said barrel of tar feloniously did have and receive, he, the said Josiah Ives, on the day and year last aforesaid, in the county aforesaid, well knowing the said bale of cotton and the said barrel of tar to have been theretofore feloniously stolen, taken, and carried away, contrary to the form of the statute in such case, made and provided, and against the peace and dignity of the State.

There was a motion in arrest of judgment, which was overruled. Judgment against the defendant, from which he appealed to the Supreme Court.

PEARSON, J. The defendant was convicted upon the fifth and sixth counts in the bill of indictment; and the case is here upon a motion in arrest of judgment. The fifth count was abandoned by the Attorney-General, and the question is upon the sixth count.

A receiver of stolen goods is made an accessary by the statute of Anne; and it is provided, by another section of that statute, that, if the principal felon escapes and is not amenable to the process of the law, then such accessary may be indicted, as for a misdemeanor. This statute was so construed as to require, in the indictment for a misdemeanor, an averment that the principal felon was not amenable to the process of the law. Foster, 373. Our statute, Rev. Stat. c. 34, §§ 53 and 54, is taken from the statute of Anne, and has received a similar construction. Groff's Case, 1 Mur. 270, and see the remarks of Henderson, judge, in Good's Case, 1 Hawks, 463.

The objection taken to the indictment, is the absence of an averment, that the principal felon is not amenable to the process of the law; and it is insisted that, as the principal felon is alleged to be some person to the jurors unknown, it could not be averred that he had "escaped and eluded the process of the law," in the words used by our statute,

and it was urged that the statute did not apply to a case of the kind.

The Attorney-General in reply took the position, that the averment that the principal felon was some person to the jurors unknown, necessarily included and amounted to an averment, that he had escaped and eluded the process of the law, so as not to be amenable to justice. This would seem to be so; but we give no definite opinion, because there is another defect in the count, which is clearly fatal.

After averring that the cotton and tar had been stolen by some person to the jurors unknown, the indictment proceeds: "Afterwards, etc., the said Josiah Ives, the said bale of cotton and the said barrel of tar feloniously did have and receive, well knowing the said bale of cotton and barrel of tar to have been theretofore feloniously stolen," etc. There is no averment from whom the defendant received the cotton and tar. We cannot imply that he received them from the person who stole them. It may be that he received them from some third person; and this question is presented: A. steals an article, B. receives it, and C. receives it from B. Does the case fall within the statute? We think not. The statute obviously contemplates a case where goods are received from the person who stole them; he is termed the principal felon. In the case put above, A. is the principal felon, B. is his accessary, but C. is a receiver from a receiver, — an accessary of an accessary. In fact, it cannot be said whether A. or B. is the principal felon in regard to him.

The statute does not provide for such a case. It makes the *receiver* an accessary; and in case the principal is not amenable to the process of law, *such accessary* may be prosecuted as for a misdemeanor. Consequently it is necessary to point out the principle, and the matter is involved in the doctrine of "principal and accessary." This and many other omissions are, in England, remedied by the statutes, Will. III. and Geo. II., by which "the act of receiving" is made a substantive felony, without reference to the person who stole or the person from whom the goods are received. Under those statutes, the fifth count, which the Attorney-General has properly abandoned, would be good; for the offence is to "receive and have" stolen goods. We have not adopted those statutes. Of course the decisions and forms in the modern English books cannot aid us. Duncan's case, 6 Ired. 98, presents another instance, to provide for which we have no statute.

Per Curiam. Judgment below reversed, and judgment arrested.

REGINA v. REARDON,[1]

L. R. 1 C. C. R. 31 [1866].

CROWN CASE RESERVED.

THE following case was stated by LUSH, J.: —

The prisoners were jointly indicted before me at Manchester for receiving stolen goods knowing them to have been stolen. There was no evidence of a joint receipt; but Reardon, who kept a house of her own, was in the practice of receiving stolen property from the thief or his accomplice and of selling it to Bloor, who also had a place of business of his own. The jury found each guilty. I sentenced Bloor; but an objection having been taken that upon the indictment a conviction of both could not stand I respited the sentence against Reardon and reserved for the opinion of the Court of Criminal Appeal the question whether the conviction against her is sustainable upon this indictment.

This case was argued on the 28th of April, 1866, before POLLOCK, C. B,, BRAMWELL, B., BYLES, J., PIGOTT, B., and LUSH, J.

Cottingham for the prisoner Reardon. The question in this case is whether, upon an indictment of two persons for a joint receipt, both can be convicted when no joint receipt but only a separate receipt at different times is proved. Before the 14 & 15 Vict. c. 100, if two or more persons were jointly indicted for receiving, and no joint act of receiving was proved, the prosecutor was put to his election and could only convict one of them; R. *v.* Messingham.[2] The 14 & 15 Vict. c. 100, § 14, remedied this inconvenience to some extent; and although that section is now repealed it has been re-enacted by the 24 & 25 Vict. c. 96, § 94, which provides that "if upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of such property." That section however only applies to a separate receipt of different parts of the stolen property, at

[1] The 24 & 25 Vict. c. 96, § 94, enacts that, "If upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of the said property."

[2] 1 Moody C. C. 257.

the same time leaving the old law to operate where there has been a separate receipt of the whole at successive times.

[Pollock, C. B. A man who receives the whole of the stolen property receives a part; for the whole embraces all the parts.

Bramwell, B. The old-fashioned indictment would have alleged that the two prisoners "then and there" (*i. e.*, at the same time and place) received the goods; and in this case that averment could not have been proved.]

This point was raised in Regina *v.* Dring [1] but was not decided. By the 24 & 25 Vict. c. 96, § 93, any number of receivers at different times of the stolen property or of any part thereof may be charged with substantive felonies in the same indictment; but the proper mode of carrying out that enactment is to indict them for separate receipts in different counts, and not as was done here to indict them for a joint receipt in a single count.

Pollock, C. B. The object of the enactment in question was to do away with certain technical objections which prevailed previously. By the 93d section any number of receivers of the same stolen property or of different parts of it may be indicted together, although there has been no joint receipt; and it is clear that under that section no distinction is made between separate receipts at the same time and separate receipts at different times. That section throws light on the 94th; and although there is some color for the objection we are all of opinion that no distinction can be made for the purposes of that section between a separate receipt of the whole and a separate receipt of part of the stolen property. It would be absurd to convict both prisoners if it were proved that each separately received a part, and to acquit one if it were proved that each separately received the whole.[2] *Conviction affirmed.*

[1] Dears. & B. C. C. 329.

[2] [See also Rex *v.* Messingham, 1 Moody C. C. 257 (1830) and Regina *v.* Dovey, 2 Den. C. C. 86 (1851), — both cases of pleading, but both distinctly implying, however, that a second receiver is indictable in the common form under the ordinary receiving statutes. In each of these cases there was a receiving from a receiver. In each case the first and second receiver were indicted jointly. And it was held, and very properly, that as their acts were separate they were guilty of no joint act and could not under the then existing statutes be jointly indicted. The whole question, however, was treated merely as one of pleading or procedure, and there is no intimation in the opinions that the second receiver could not be indicted at all. If the case could have been disposed of upon the merits, namely, upon the point that the second receiver was guilty of no indictable offence, the court would have rested its decision upon that ground and would not have treated the question before it as a question of pleading or procedure. The treatment of these cases in Roscoe Crim. Evid. p. 19, supports the same conclusion. "Rex *v.* Messingham," says that work, "shows that several persons cannot be convicted of distinct felonies which are charged in an indictment as a joint felony. . . . But now by the 24 & 25 Vict. c. 96, § 94, . . . this difficulty is removed."]

SECTION 7. THE QUESTION OF *Lucri Causa.*

REX *v.* RICHARDSON,

6 C. & P. 335 [1834].

FOUR of the prisoners were indicted for sacrilegiously breaking and entering a chapel, called St. Philip's Chapel, in the parish of Clerkenwell, and stealing therein certain things. The other prisoner was charged as receiver.

. . . . . .

TAUNTON, J. (in summing up with respect to the receiver), said: Whether he made any bargain or not is a matter of no consequence. If he received the property for the mere purpose of concealment without deriving any profit at all he is just as much a receiver as if he had purchased it. It is a receiving within the meaning of the statute.

Verdict, three of the prisoners guilty and two of them not guilty.

COMMONWEALTH *v.* BEAN,

117 MASS. 141 [1875].

COMPLAINT on the Gen. Sts. c. 161, § 43, charging the defendant with receiving a pair of eye-glasses, knowing them to have been stolen.

At the trial in the Superior Court on appeal before Lord, J., there was evidence tending to show that the defendant received the eye-glasses from one Daniels, knowing them to have been stolen, as a friendly act and without emolument or benefit to the defendant or any intent to receive benefit on his part; but only that they were taken to aid Daniels in concealing them.

The defendant asked the judge to rule that if such was the case it did not constitute the offence of receiving stolen goods within the statute. The judge declined so to rule but instructed the jury that the defendant's motive was immaterial if he received them knowing them to have been stolen and for the purpose of aiding Daniels in concealing them. The jury returned a verdict of guilty and the defendant alleged exceptions.

ENDICOTT, J. The statute provides that whoever receives or aids in the concealment of stolen goods, knowing the same to have been stolen, shall be punished. Gen. Sts. c. 161, § 43. The ruling at the trial was correct. There was evidence that the defendant received the eye-

glasses from Daniels, knowing them to have been stolen, and aided Daniels in their concealment. That he did this as a friendly act to Daniels without any benefit or intent to receive benefit himself is immaterial.

Exceptions overruled.

Section 8. Guilty Knowledge.

COMMONWEALTH *v.* LEONARD,

140 Mass. 473 [1886].

Indictment in three counts. The first count alleged that on July 1, 1883, certain articles, the goods, chattels, and property of the Boston and Lowell Railroad Corporation, were feloniously stolen, and that the defendant afterward, on the same day, "the goods, chattels, and property aforesaid, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, and did then and there aid in the concealment of the same," he "well knowing the said goods, chattels, and property to have been feloniously stolen, taken, and carried away."

The second and third counts were similar in form, but the property was in each differently described and at a different date, namely, on August 1, 1883, and September 1, 1883, respectively.

. . . . . .

The defendant asked the judge to instruct the jury as follows: "1. If the jury are not satisfied beyond a reasonable doubt that the accused knew that the goods were stolen he is entitled to an acquittal. 2. To justify a conviction it is not sufficient to show that the accused had a general knowledge of the circumstances under which the goods were stolen, unless the jury are also satisfied that he knew that the circumstances were such as constituted larceny."

. . . . . .

The judge refused to give these instructions and upon the matters embraced therein instructed the jury as follows: —

. . . . . .

"He must know that the goods were stolen but he does not need to know the hour nor day they were stolen; he must undoubtedly have notice which would put him on his guard as knowledge that the goods were acquired and turned over to him by a person not taking them by mistake, not by right, but taking them as thieves take them, that is, for the purpose of defrauding the railroad and cheating them out of their property."

The defendant's counsel here suggested "by larceny," and the judge gave this further instruction: —

"By the taking and carrying away of property it is the fraudulent taking away of the property of another for the purpose of converting it to the taker's use to deprive the owner of it. These goods must have been taken that way and were stolen goods; they must have been taken by McCarty as thieves take them, not by mistake or accident, or by taking from those who had no right to give, but taking when he knew that he had no right to take them."

The jury returned a verdict of guilty on the third count and of not guilty on the other counts, and the defendant alleged exceptions.

FIELD, J. . . . The offence of receiving stolen property, knowing it to have been stolen, must be considered as distinct from the offence of receiving embezzled property knowing it to have been embezzled, Pub. Sts. c. 203, §§ 48, 51, although embezzlement under our statutes has been held to be a species of larceny. Commonwealth *v.* Pratt, 132 Mass. 246. The punishments of the two offences may be different, as the offence of receiving embezzled goods may be punished by a fine without imprisonment. If the property had actually been stolen, a belief on the part of the defendant that it had been stolen is tantamount to knowledge. If the defendant knew all the facts and the facts constituted larceny as distinguished from embezzlement, it would be no defence that the defendant thought that the facts constituted embezzlement. If the defendant did not know the facts but believed from the circumstances that the property had been either embezzled or stolen, and it had been actually stolen, it was competent for the jury to find the defendant guilty of the offence charged. The second request for instructions was therefore rightly refused.

The first request for instructions states the law with substantial correctness. It is contended that the instructions given on this point, rightly construed, are the same in effect. We find it unnecessary to decide whether the case called for a more careful definition of larceny as distinguished from embezzlement or from wilful trespass.

. . . . . .

Exceptions sustained.

REGINA *v.* RYMES,

3 C. & K. 326 [1853].

RECEIVING. The indictment was in the following form: "The jurors, etc., present that Richard Rymes, of, etc., on, etc., at, etc., one cheese, of the value of thirteen shillings, of the goods and chattels

of James Pollard, then lately before unlawfully, knowingly, and designedly obtained from the said James Pollard by false pretences, unlawfully did receive and have, he the said Richard Rymes then well knowing the said goods and chattels to have been unlawfully, knowingly, and designedly obtained from the said James Pollard by false pretences, against the form of the statute," etc.

It was proved by a person named Richard Smith that he had gone to the shop of Mr. Pollard and had obtained a cheese by false pretences; and with respect to the prisoner's receiving the cheese, he said, "I took the cheese to Rymes, who keeps a beer house; he asked what I wanted for it; I said I wanted 4*d.* a pound, and he gave me 4*s.* for it; and I paid him back some of the money for beer." It was proved by Mr. Pollard that the cheese was worth 13*s.* 8*d.*, and a constable named Wright proved that he found part of the cheese in the thatch of the prisoner's house.

Carrington, for the prisoner, addressed the jury, and contended that the allegation that the prisoner knew that the cheese had been obtained by false pretences was not proved. Buying an article at an under price had been held to be a fact from which the jury might infer that the buyer knew it to be stolen, but here Smith had proved everything that had occurred, and it was quite clear that the prisoner could not have had the slightest knowledge that the cheese was obtained by false pretences, or obtained from Mr. Pollard.

. . . . . .

Vaughan Williams, J., left the case to the jury on the question, whether the prisoner knew that the cheese had been obtained by false pretences; and directed the jury, that if the prisoner did not know that the cheese was obtained by false pretences, they ought to acquit him. *Verdict, not guilty.*

REGINA *v.* HARRIET AND ANTHONY ADAMS,

1 F. & F. 86 [1858].

Larceny and Receiving. The woman was charged with having stolen, and the man (her husband) with having received, eleven mining tools. The evidence was that the woman had picked them up from a rubbish-heap, where they had been placed (not as rubbish), on the premises of the prosecutor, and delivered them to the man, telling him how she had obtained them, and that he had sold them as old iron.

Crowder, J. (*to the jury*), after stating to them the law as to the duty of a finder of property, as applicable to the charge against the

woman, and leaving the case as against her with them: Before you can convict the man you must be satisfied that he knew that the goods had been stolen. It may be that he did not know (upon the law as I have laid it down, as to the duty of the finder of property to take proper means to find the owners) that this was a theft.[1] If so, he cannot be guilty of receiving with a guilty knowledge of the goods being stolen.

Both guilty; recommended to mercy; fourteen days' imprisonment.

Section 9. The Question of Knowledge.

REGINA *v.* WHITE,

1 F. & F. 665 [1859].

Receiving. The prisoner was charged with receiving lead, the property of the Queen, he well knowing it to have been stolen.

Bramwell, B. (*to the jury*). The knowledge charged in this indictment need not be such knowledge as would be acquired if the prisoner had actually seen the lead stolen; it is sufficient if you think the circumstances were such, accompanying the transaction, as to make the prisoner believe that it had been stolen. *Guilty.*

REGINA *v.* ODDY,

5 Cox C. C. 210 [1851].

COURT OF CRIMINAL APPEAL.

[Indictment for receiving stolen goods.]

. . . . . .

At the trial it was proved that the cloth mentioned in the indictment had been stolen on the night between the 2d and 3d of March, 1851, from a mill, and was the property of the party named in that behalf in the indictment. It was further proved that the defendant was found in possession of it on the 10th of March, 1851, under circumstances which it was suggested showed an attempt to conceal the possession. It was further proved that the defendant, upon the cloth being discovered in

[1] That is, it is apprehended that the other prisoner had not taken proper means to find the owner. [Reporter's note.]

his possession, declared that he had obtained the cloth from a woman, who was called as a witness at the trial on the part of the prosecution, and who swore that it had not been obtained from her. The counsel for the prosecution proposed further to prove that the defendant's house had been searched within an hour after the property named in the indictment was found in his possession, and that upon this search two other pieces of cloth were found in the house; and also, that on the 13th of December, 1850, the defendant had been in possession of two more pieces of cloth, and that these four pieces of cloth had been stolen on the night between the 4th and 5th of December, 1850, from another mill, and were the property of different owners, no one of whom was connected with the owner of the cloth mentioned in the indictment. The counsel for the defendant objected to the reception of this evidence.

. . . . . .

Lord Campbell, C. J. I am of opinion that the evidence was as little receivable under the 3d count for receiving as upon the 1st or 2d counts for stealing. It would be evidence to prove that the prisoner is a very bad man, and likely to commit such an offence; but by the law of England one offence is not allowed to be given in evidence to prove another. How can the possession of other stolen goods show any knowledge that the particular goods mentioned in the indictment were stolen? It can lead to no such conclusion. With regard to the admission in evidence of proof of previous utterings upon indictments for uttering forged notes, I have always thought that those decisions go a great way, and I am by no means inclined to apply them to the criminal law generally; but certainly evidence of that description shows the prisoner skilful in dealing with forged paper, and that may lead to the inference that he knew the particular notes to be forged; but there is no ground upon which, from evidence like this, the *scienter* can be inferred upon a charge of feloniously receiving stolen goods. A similar point was properly decided by my brothers Alderson and Talfourd, in Sirrell's case, at Liverpool; and I think this evidence was improperly admitted, and that the conviction must be quashed.

Alderson, B. In the cases of uttering, the act received in evidence is of the same nature as that which it is to explain; but the evidence which is offered to prove a guilty knowledge on this occasion is quite consistent with the supposition that on the former occasions the prisoner himself stole the goods. Here the prisoner is found not to have stolen, but to have received, the goods.

The other judges concurring,

Conviction reversed.

CHAPTER XXXIX.[1]

Forcible Entry.

REX v. WILSON and ELEVEN OTHERS,

8 D. & E. 357 [1799].

This was an indictment for a forcible entry and detainer at common law. The first count stated that the defendants on, etc., in the parish of St. Peter, in the county of the borough of Carmarthen, with force and arms, unlawfully and injuriously, and with a strong hand, entered into a certain mill, and certain lands and houses, and the sites of a certain mill and certain houses, with the appurtenances, being in the possession of M. Lewis, and him the said M. Lewis from the possession of the said premises unlawfully and injuriously, and with a strong hand, expelled and put out, and unlawfully and injuriously kept him out, and still keep him out, against the peace, etc. The third count was to the same effect, only varying in the description of the premises. The second and fourth counts were the same as the first and third respectively, only omitting the words "with a strong hand." To all these counts there was a general demurrer, and joinder in demurrer.

[Opinions by Lord Kenyon, C. J., Grose, J., Lawrence, J., and Le Blanc, J.]

. . . . . .

Judgment for the Crown on the first and third counts.

On a subsequent day in the term,

Lord Kenyon, C. J., said: We wish that the grounds of our opinion may be understood. We do not in the least doubt the propriety of the decision in this case the other day, but we desire that it may not be considered as a precedent in other cases to which it does not apply. Perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says, that at common law the party may enter with force into that to which he has a legal title. But without giving any opinion concerning that dictum one way or the other, but leaving it to be proved or disproved whenever that question shall arise, all that we

[1] [See as to this offence at common law, 1 Hawkins, P. C. 495: Of Forcible Entries and Detainers.]

wish to say is that our opinion in this case leaves that question untouched, it appearing by this indictment that the defendants *unlawfully* entered, and therefore the Court cannot intend that they had any title.[1]

HARDING'S CASE,[2]

1 Greenleaf, 22 [1820].

The defendant was indicted for that he "with force and arms, to wit, with an axe and auger, unlawfully, violently, forcibly, injuriously, and with a strong hand did enter into the dwelling-house of Joseph Cate in said Portland, and in his actual and exclusive possession and occupation with his family; and the said Harding did then and there unlawfully, violently, forcibly, injuriously, and with a strong hand bore into said dwelling-house with said auger, and cut away a part of said house, and stove in the doors and windows thereof with said axe, said Joseph's wife and children being in said house, thereby putting them in fear of their lives," etc.

. . . . . .

Preble, J. . . . The indictment is at common law. If the facts charged, therefore, do not constitute an indictable offence at common law, no sentence can be pronounced upon the defendant.

The earlier authorities do sanction the doctrine that at common law, if a man had a right of entry in him, he was permitted to enter with force and arms where such force was necessary to regain his possession. (Hawk. P. C. c. 64, and the authorities there cited.) To remedy the evils arising from this supposed defect in the common law, it was provided by Stat. 5, Rich. II. c. 7, that "none should make any entry into any lands or tenements, but in cases where entry is given by the law; and in such cases, not with strong hand, nor with multitude of people, but only in a peaceable and easy manner." The authorities are numerous to show that for a trespass — a mere civil injury, unaccompanied with actual force or violence, though alleged to have been committed with force and arms — an indictment will not lie. But in Rex *v.* Bathurst, Sayers' Report, 226, the Court held that forcible entry into a man's dwelling-house was an indictable offence at common law, though the force was alleged only in the formal words, *vi et armis*. In Rex *v.* Bake, 3 Burr. 1731, it was held that for a forcible entry an indictment will lie at common law; but actual force

[1] [See Rex *v.* Bathurst, Sayer's Report, 225 (1755).]

[2] [See Commonwealth *v.* Shattuck, 4 Cush. 141 (1849).]

must appear on the face of the indictment, and is not to be implied from the allegation that the act was done *vi et armis*. In the King *v.* Wilson, 8 D. & E. 357, an indictment at common law charging the defendant with having unlawfully and with a strong hand entered the prosecutor's mill and expelled him from the possession, was held good. In this latter case, Lord Kenyon remarks, "God forbid these facts, if proved, should not be an indictable offence; the peace of the whole country would be endangered if it were not so." The case at bar is a much stronger one than either of those cited. The peace of the State would indeed be jeopardized if any lawless individual, destitute of property, might, without being liable to be indicted and punished, unlawfully, violently, and with a strong hand, armed with an axe and auger, forcibly enter a man's dwelling-house, then in his actual, exclusive possession and occupancy with his wife and children, stave in the doors and windows, cutting and destroying, and putting the women and children in fear of their lives.

REX *v.* BAKE AND OTHERS,

3 BURR. 1731.

MR. DUNNING showed cause why an indictment should not be quashed.

He called it an indictment for a forcible entry, and argued "that an indictment for a forcible entry may be maintained at common law." He cited a case in Trin. 1753, 26, 27 Geo. II. B. R. Rex *v.* Brown and Others; and Rex *v.* Bathurst, Tr. 1755, 28 Geo. II. S. P.

But, N. B. This indictment at present in question was only for (*vi et armis*) breaking and entering a *close* (not a dwelling-house) and unlawfully and unjustly expelling the prosecutors, and keeping them out of possession.

. . . . . .

MR. JUSTICE WILMOT. No doubt an indictment will lie at common law for a forcible entry, though they are generally brought on the Acts of Parliament. On the Acts of Parliament, it is necessary to state the nature of the estate, because there must be restitution; but they may be brought at common law.

Here the words "force and arms" are not applied to the whole; but if they were applied to the whole, yet it ought to be such an actual force as implies a breach of the peace, and makes an indictable offence.

And this I take to be the rule, "That it ought to appear upon the face of the indictment to be an indictable offence."

Here indeed are sixteen defendants. But the number of the defendants makes no difference in itself; no riot, or unlawful assembly, or anything of that kind is charged. It ought to amount to an actual breach of the peace indictable, in order to support an indictment; for otherwise it is only a matter of civil complaint. And this ought to appear upon the face of the indictment.

Mr. Justice Yates concurred. Here is no force or violence shown upon the face of the indictment, to make it appear to be an actual force indictable, nor is any riot charged, or any unlawful assembly. Therefore the mere number makes no difference.

Mr. Justice Aston concurred. The true rule is, "That it ought to appear upon the face of the indictment to be an indictable offence."

. . . . . .

CHAPTER XL.

Burglary and Other Breakings.[1]

Section 1. The Building.

PEOPLE *v.* RICHARDS,

108 N. Y. 137 [1888].

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 30, 1887, which affirmed a judgment of the Court of Oyer and Terminer

[1] "Hamsocna [a] quod domus invasionem Latine sonat fit pluribus modis. Hamsocna est si quis alium in sua vel alterius domo cum haraido [b] assailiaverit vel persequatur, ut portam vel domum sagittet vel lapidet vel colpum [? culpam] ostensibilem undecunque faciat. Hamsocna est vel hame fare si quis premeditate ad domum

[a] Hen. I, lxxx. 10; Thorps, i. 587. — [Stephen's note.]

[b] *Haraidum — heri* [here?] *reita*. The Bavarian laws took a distinction between *here reita* and *heimzucht*. For *here reita* there must be at least forty-two armed men. If there were less it was *heimzucht* (Thorpe's *Glossary*). In Ina's laws (13 Thorpe's, 48) it is said, "Thieves we call as far as 7 men; from vii. to xxxv. a *hloth*; after that it is a *here*." — [Stephen's note.]

of Broome County, entered upon a verdict, convicting the defendant of the crime of burglary in the third degree. (Reported below, 44 Hun, 278).

The material facts are stated in the opinion.

. . . . . .

PECKHAM, J. The defendant was charged in the indictment with having committed the crime of burglary in the third degree in that on the 23d day of October, 1884, with force and arms in the night time, at the city of Binghamton, he broke and entered the granite and stone building, erection, and inclosure, known as the Phelps vault, the same being a building, erection, and inclosure for the interment of the dead, and being the property of, etc. Upon the trial the People proved that this vault was made of granite at a cost of $5,000. It was built entirely above ground on a stone foundation, and the structure was ten feet four inches wide, sixteen feet four inches long, ten feet six inches high, and covered with a granite roof. The entrance was by a granite door protected by a bronze gate. The interior of the vault immediately inside of the interior granite door has a compartment about six feet in depth and eight feet across, and is unoccupied. At the rear of this compartment there is a partition across the width of the vault, and behind that partition the bodies are inclosed. There are twelve compartments, or graves, as they are described by one of the witnesses, and seven of these graves were occupied at the time of the commission of the alleged burglary by the defendant. In front of each grave was a marble slab bearing the name and date of death and the age of the occupant. Other evidence was given in the case connecting the defendant with the commission of the act of breaking into this structure and examining the dead body of Robert S. Phelps, which was therein contained. His purpose in doing so it is not material to inquire in regard to, under the view which we take of the statute as to burglary.

At the close of the case for the People, defendant's counsel asked the Court to direct or advise the jury to find a verdict of not guilty in behalf of the defendant Richards upon the grounds, —

First. That the acts proven in this case are not within the provisions of the Penal Code.

eat ubi suum hostem esse siet, et ibi eum invadat in die vel nocte hoc faciat; et qui aliquem in molinum vel ovile fugientem prosequitur hamsocna adjudicatur. Si in curia vel domo seditione orta bellum eciam subsequatur et quivis alium fugientem in aliam domum infuget, si ibi duo tecta sint hamsocna reputatur. Infiht vel insocna est quod ab ipsis qui in domo sunt contubernales agitur." [Cited in Stephen, History Criminal Law of England, vol. 1, p. 56. Upon this Stephen remarks; "Hamsocna was no doubt the earlier form of burglary." — ED.]

Second. Upon the ground that the vault or grave is not a building within the meaning of the statute which is capable of being burglarized.

Third. That the proof in the case wholly failed to sustain the offence charged in the indictment.

The Court denied the motion and held that it was a case for the jury. We think the Court erred in that decision. We do not believe that the structure described in the indictment and the proof is within the statute describing the crime of burglary in the third or any degree. As was stated by ANDREWS, J., in People *v.* Rogers (86 N. Y. 360), "burglary at common law is an offence against the habitation of men." It may also be stated that the crime of burglary, even at common law, extends to the felonious breaking and entering a church. 3 Inst. 64; 1 Hale's Pleas of the Crown, 556; 1 Hawks. Pleas of the Crown, c. 38, § 17; 2 Russell on Crimes, 1; Regina *v.* Baker, 3 Cox C. C. 581; 2 Wharton's Cr. Law, § 1556. Lord Coke was of the opinion that the crime could be committed in regard to a church because, as he said, it was the mansion-house of the Omnipotent God. Lord Hale said that was only Lord Coke's quaint way of putting it, and that burglary at common law could be committed by breaking and entering, not only a mansion-house, but a church, as a church, and without speaking of it as the mansion-house of God.

It will be seen upon examination that there were two exceptions at common law to the general rule that burglary consisted in breaking into a mansion-house, the word "mansion" being synonymous in that respect with "dwelling-house." Those two exceptions were, first, in regard to a church, and second, in regard to breaking through the walls or gates of a town. It was, however, primarily an offence committed against a man's house, his dwelling, and in the night time. The Revised Laws of the State defined burglary without dividing it into degrees. By the Revised Statutes burglary in the third degree was made to consist of breaking and entering with intent to steal or to commit any felony. The exact terms of the statute are as follows: "Every person who shall be convicted of breaking and entering in the day or in the night time, (1) Any building within the curtilage of a dwelling-house but not forming a part thereof; (2) Any shop, store, booth, tent, warehouse or other building in which any goods, merchandise, or valuable thing shall be kept for use, sale, or deposit, with intent to steal therein or to commit any felony, shall upon conviction be adjudged guilty of burglary in the third degree." (2 R. S., 669, § 17.) From the time of the passage of the Revised Statutes up to 1863, the crime stood as therein defined. By chapter 244 of the Laws of 1863, the above section was amended by inserting in the second subdivision, after the words "or other building," the words, "or any

railroad car, shop, vessel or canal boat." We think it plain that all the words used in the Revised Statutes or in the Statute of 1863, in defining burglary in the third degree, referred to structures erected or built for the purpose of answering the necessities of living men in their intercourse with each other of a trading or commercial nature, where their property might be deposited and used or while awaiting sale or transportation. Hence the Revised Statutes in describing the crime of burglary in the third degree, or the Act of 1863 above mentioned, did not cover such a case as is presented by this indictment and proof; and if this were all there was in the case we think there would scarcely be room for argument on this subject. Great weight, however, is laid by the learned counsel for the People on the language used in the Penal Code. That statute in defining burglary in the third degree enacts as follows (§ 498): "A person who either, (1) With intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building; or, (2) Being in any building, commits a crime therein and breaks out of the same, is guilty of burglary in the third degree."

Section 504 says: "The term 'building,' as used in this chapter, includes a railway car, vessel, booth, tent, shop, or other erection or inclosure."

There is contained in the section of the Code one alteration in the definition of the crime, as it is made burglary to break and enter a building with intent to commit a crime, instead of, as in the old statute, with an intent to commit a larceny or felony. As section 504 does not say that the term "building" shall only include such structures as are therein named, it is argued that anything which can possibly be regarded as a building under the broadest and most liberal signification of that term, is included therein, or at least, is included in the expression added at the end of the section, "or other erection or inclosure." If this be sound, a most sweeping enlargement of the generally accepted idea of the nature of the crime of burglary is accomplished in a statute which has been regarded more in the light of a codification of the body of the criminal law than as materially altering and enlarging its scope and nature. We do not believe in this instance that any such result was contemplated by the legislature. Leaving section 504 for a moment out of view, the crime of burglary is defined as a breaking into a building with intent, etc., and the question arises as to the meaning of the word "building." Finding it used in a statute defining burglary, two courses suggest themselves: (1) to regard the term as limited to those structures which the common law as amended and enlarged by our statutes relative to the crime made capable of being broken and entered burglariously; or, (2) to take the widest significa-

tion which has ever been given to the term "building," and hold that every structure within such meaning is within the statute, provided it could be physically broken and entered. We are persuaded that the first course is the true one. We are unable to believe that the legislature meant to accomplish so radical a change in the nature of this crime by the use of language, which by its context is capable of a much more restricted meaning, and one which is fully in accord with the nature of the crime as known to the common law and to our statutes down to the adoption of the Penal Code. The slight alteration made by the Code as to the intent which is to accompany the breaking and entering, from an intent to steal or to commit any felony to an intent to commit any crime, does not militate, as we think, against this reasoning, for that alteration is of comparatively slight importance and does not really change the nature of the crime. In the absence of other and controlling reasons we are disposed to limit the term "building" to those structures included in the common law and statutory definitions of the crime. We find at common law that burglary, so far as the character of the building was concerned, was committed by an unlawful breaking and entering of a dwelling-house. Our early statutes made the breaking and entering of such a structure in the night time with intent to commit some crime therein, when there was a human being within, burglary in the first degree, and when the entry was made in the day time, burglary in the second degree. Subsequently burglary in the third degree was made to consist in breaking any building within the curtilage of a dwelling-house but not forming a part thereof, or in breaking and entering "any shop, store, booth," etc., as already cited. It is thus seen that up to the time of the adoption of the Penal Code, the structures in regard to which burglary could be committed had been quite clearly defined, and the term "building" as used in connection with the crime of burglary had a definite and well understood meaning. To attach the same meaning to it in a statute upon the same subject, passed under the circumstances in which this Penal Code was passed, and where there is no such wide departure from the language used in the Revised Statutes or Act of 1863 as to indicate a different and enlarged sense as to the meaning of the word, seems to us to be the natural and the true course to adopt. There would be no propriety in taking the most enlarged meaning anywhere given to the word and accepting it as the true sense in which it was used in this statute defining burglary in the third degree.

Now what effect upon this reasoning does a reference to section 504 have? That section simply says that the term "building" includes a "railroad car, vessel, booth, tent, shop," etc., and leaves out the words "in which any goods, merchandise, or valuable thing shall be

kept for use, sale, or deposit." This omission we do not regard as very material, or as enlarging in any way the definition of the crime, for the specific words used imply substantially the same meaning, which is to be gathered from the use of the words which are omitted, and which is probably the cause of their omission. The meaning of the term "building," other than as including therein the structures specifically mentioned in the statute is still left, as we think, to be gathered precisely in the same way as it would have been if section 504 had not been passed.

We think that the term as used in these two sections of the Penal Code under discussion does not enlarge the character of the crime of burglary to such an extent as to include the structure described in this indictment and in the proof given under it. Careful and painstaking research has been exhibited in the very full briefs furnished us by counsel for the People; but they have succeeded in finding no case which would include a structure such as this within the term "building" in connection with any statute similar to ours in regard to burglary. We are quite sure none such can be found. Very many cases are cited by counsel on both sides as to what is included in the term "building" when used in various statutes relating to various subjects. Such, for example, as the fire law in cities; the English Reform Act of 1832 (§ 27) as to what sort of a building was within the section of that Act as qualifying the owner or the tenant to vote; also the English Act in relation to arson, as to what was a building and when it was sufficiently completed to be within the statute; also the statute in relation to mechanic's liens, as to what was a building upon which a lien could be placed. We do not think that any good can be gained by a separate consideration of each one of those cases. We have looked at them all, and the most that can be said is that each court defines the word with relation to the subject-matter of the statute which was under consideration, and the best that can be said has been said by many of the judges in those cases, which is, that it is impossible to give a general, absolute, and far reaching definition or meaning to that word which shall cover all possible cases. They say they can but define the language with reference to the facts in each case and the special subject under consideration, and as determining whether in the particular case in hand the structure in question does or does not come within the purview of the statute. That is all that we can do here. Taking the law in regard to burglary from the earliest period of the common law where that crime is referred to down to the present time, we feel quite confident that not one case can be found where breaking and entering such a structure as the one in question has been held to come within that crime. We simply intend to decide this case and no other; and when

we come to examine the indictment, and the proof giving a description of the structure, we come to the belief that it is really nothing more than a grave above ground. The witness speaks of these various compartments as graves. They are intended solely for the interment of dead bodies, and the structure itself can be put to no other possible use without altering its nature and purpose. The small room, as it is termed, in the front portion of the structure between the outside wall and the place for the deposit of the coffins, is used for nothing. No services of a religious nature could be carried on there, and language could not be tortured into calling that place a church, or a place for religious worship. If instead of being placed above ground this structure had been placed in a foundation deep enough to receive it, and then used for the purpose of burying the dead, and that only, could there be any question that it was not the subject of burglary, even although sufficient of the structure were above ground to enable one to reach it through a door and steps? We think not; and we do not think it becomes a building within the statute in regard to burglary any more because it is placed above the ground when its sole purpose is that it shall be used as furnishing graves for the burial of the dead.

It is claimed, however, if this structure is not included in the term "building" as used in this statute, that the words added at the end of section 504 and already alluded to, namely, "or other erection or enclosure," would include it. They undoubtedly would if the widest meaning of those words is to be taken as within the meaning of the legislature, and if whatever could under other circumstances and for other purposes be called an erection or inclosure is to be regarded as the subject of burglary.

We do not attach any such meaning to those words when used in this connection, and we think it quite plain that the legislature never intended any such meaning. A farm lot or a vacant city lot might be inclosed with a fence and inside that fence there would be an inclosure; can it be supposed possible that the legislature intended that burglary might be committed by breaking and entering such an inclosure? In one sense, and in the widest, anything that is inclosed is an inclosure, and the thing which inclosed it would be the thing the breaking of which and entering the inclosure would be burglary. A bronze statue in a public square is an erection, and if it be of colossal size may be broken and entered. Can any one suppose that burglary could be predicated of such an act? These are extreme cases, but they are nevertheless within the possible meaning of those terms, when such meaning is not to be arrived at and limited by an examination of the context.

It is plain that some limitation must be made to the meaning of those words other than their possible capacity when standing alone. Now there are certain rules and canons of construction in such cases as this which seem to us to serve as a perfect guide to the meaning of the language used in this statute. The rule which usually obtains in cases of this kind is that where general words follow specific words designating certain special things, the general words are to be limited to cases of the same general nature as those which are specified. The rule is familiar and needs not the citation of many authorities.

. . . . . .

Applying a rule which is so well established both in England and in this country to the case in hand, we think that the phrase "other erection or inclosure" is to be interpreted as including things of a similar nature to those already described by the specific words found in the statute. If this be so, then under the phrase in question the erection or inclosure included in burglary in the third degree was to be of that character which mankind used for the purpose of sheltering property, or for the purpose of transporting the same, or the purpose of trade or commercial intercourse.

In arriving at this conclusion it is not necessary that we should also show that the act committed by the defendant subjected him to punishment as a crime of some kind. We think it was the plain intent of the law-making power to keep the distinction clear between crimes against the living and against the property of the living and crimes against public decency, in the way of desecrating the graves of the dead or the structures whose only purpose is to be a place for the permanent interment of the dead. Offences of this general nature are not provided for by the Penal Code, and whether the particular act of this defendant, as proved in this record, constitutes a crime, it is not necessary for us now to determine.

The law should not be stretched out of its fair and natural meaning for the purpose of including within the statute of burglary a case like this. If the legislature think proper, let the law be amended so as to include in plain terms such a case as this record discloses. The argument that the offence of burglary has been constantly enlarged from what it was at common law, and that the intention to enlarge it so as to include a case like this should be easily imputed to the legislature, we think is not sound. Whenever the offence has been enlarged in this State by the legislature it has been, by plain language, susceptible of no misunderstanding. We do not think any intent to enlarge the offence to the extent necessary to make the prisoner's act burglary can be founded upon the language used in the Penal Code.

These views lead to a reversal of the judgment of conviction, and as

the defendant cannot be convicted of any crime under this indictment he should be discharged.

All concur.

Judgment accordingly.

Section 2. The Intent.[1]

COMMONWEALTH *v.* NEWELL,

7 Mass. 245 [1810].

The prisoners were indicted for feloniously and burglariously breaking and entering the dwelling-house of Edward Dixon, of Boston, in the night of the 17th of August last, with the intent unlawfully and feloniously to assault the said Dixon, and to cut off one of his ears, with an intention the said Dixon to maim and disfigure; and after being so entered, for unlawfully and feloniously assaulting the said Dixon, and cutting off his right ear, with intention him to maim and disfigure, with set purpose, and of their aforethought malice, against the peace and the form of the statutes in such case provided.

The prisoners demurred to the indictment.

. . . . . .

Parsons, C. J. The objection to the indictment is that the facts therein found do not amount to felony. The breaking and entering of a dwelling-house in the night is not burglary, unless it be done with an intent to commit a felony. This position the attorney-general has not contested. The question for our decision then is, whether the cutting off the ear of Dixon, of set purpose and of malice aforethought, with the intention to maim and disfigure him, is by our laws a felony; for if it be not a felony, an intention to do it cannot be an intention to commit felony.

That the cutting off an ear, maliciously and of set purpose, with the intention to maim and disfigure is not a mayhem by the common law, is not denied; but the attorney-general has insisted that the Statute of 1804, c. 123, has made the cutting off the ear, with the disposition and intention aforesaid, a mayhem; that mayhem at common law is felony; and that, as a necessary conclusion, the cutting off the ear, maliciously and with the intention to maim and disfigure, is by force of the statute a felony.

[1] [As to breaking and entering at common law with wrongful but not felonious intent, see chapter, Forcible Entry.]

By the ancient common law, mayhem was an injury of a particular nature, constituting a specific offence, the commission of which could be regularly averred by no circumlocution, without the aid of the barbarous verb *mahemiare*. It consisted in violently and unlawfully depriving another of the use of a member proper for his defence in fighting, and was punished by a forfeiture of member for member, in consequence of which forfeiture it was deemed a felony. If the sufferer sought this satisfaction, or rather revenge, his remedy was by an appeal of mayhem; and the sovereign punished this injury done to his subject by an indictment for a mayhem; and in both the appeal and indictment the offence must be alleged to have been committed feloniously.

A punishment of this description could have existed only in a rude state of civil society; and as civilization advanced, the punishment was disused, and the offender made satisfaction by paying pecuniary damages and was punished by his sovereign by fine and imprisonment, in the same manner as in cases of trespass. So long ago was this punishment disused that Staundford, remarking on the statute of 5 H. IV. c. 5, which made the putting out of an eye felony, observes that before that statute it was not felony. He however subjoins a *quære*, and refers to Bracton.

This was the state of the common law long before and at the time when our ancestors emigrated to this country, bringing with them but a very small part of the common law, defining crimes and their punishment. Mayhem was therefore never deemed by them a felony, but only an aggravated trespass at common law; and as such, the offender was answerable to the party injured in a civil action of trespass, and to the government upon an indictment for a misdemeanor; and no statute-provision, during the existence of the colonial and provisional charters, recognizes mayhem as a distinct offence from trespass, or as constituting a specific felony. We are therefore obliged to consider mayhem as no felony by the common law adopted in this State.

. . . . . .

The attorney-general has argued that if the indictment is not a sufficient description of a felony, yet it may be supported as an indictment for a misdemeanor.

There are one or two ancient cases in favor of this position, as Holmes's case,[1] and Martin Lesser's case, in the time of Henry IV., which is reported in Cro. Jac. 497. But in a later case of Rex *v.* Westbeer,[2] the old cases were considered and overruled. The Court, when the prisoner was discharged, observed that in the cases cited for the king, the judges appeared to be transported with zeal too far.

[1] Cro. Car. 376. [2] 2 Str. 1133.

Thus stands this question at common law. But our Statute of 1805, c. 88, in authorizing a conviction of part of an indictment for felony, restrains the conviction to cases where the part, of which the prisoner is found guilty, constitutes of itself a felony. This provision seems to be a statute-construction of the point, which leaves no doubt remaining.

Per Curiam. Let judgment be entered that the indictment is bad, and let the prisoners be discharged.

REX *v.* KNIGHT, above, p. 111.

REGINA *v.* POWELL, above, p. 244.

CHAPTER XLI.

Arson and Other Burnings.

Section 1. Indictable Common Law Burning, below the Grade of Arson.

REX *v.* PROBERT,

2 East P. C. 1030.

REX *v.* ISAAC,

2 East P. C. 1031.

Section 2. Arson and Statutory Burnings

REX *v.* ELIZABETH MARCH,

1 Moo. C. C. 182 [1828].

The prisoner was tried before Alexander, C. B., at the Spring assizes for the county of Northampton, in the year 1828, on an indictment which described her as Elizabeth, the wife of John March, and charged her with unlawfully, maliciously, and feloniously setting fire to a certain house of the said John March, with intent to injure him, against the form of the statute.

It appeared from the evidence that March the prosecutor, and the prisoner his wife, had lived separate for about two years, she going by her maiden name. It was proved that previous to the act, when she

applied for the candle with which it was done, she said it was to set her husband's house on fire, because she wanted to burn him to death.

Upon another and earlier occasion she used threats of burning him and his house to a cinder. Having borrowed a candle and lantern she went to her husband's thatched house at night, and stuck the candle burning into the thatch. She was observed by a neighbor, and an alarm was given, upon which she ran away: the husband came out and pulled from the roof the burning candle and the straw immediately communicating with it, and so prevented any conflagration. The straw pulled out was proved to have been black and singed. The jury found her guilty.

The learned CHIEF BARON wished to have the opinion of the JUDGES, whether it is an offence within the 7 & 8 Geo. IV., c. 30, § 2,[1] for a wife to set fire to her husband's house for the purpose of doing him a personal injury. If not, the conviction appeared to the learned Chief Baron to be erroneous. In Rex *v.* Ann Gould, 1 Leach, 217, it was held that a woman could not be capitally convicted for stealing the goods of a stranger to the value of 40*s.* in the dwelling-house of her husband.

This case was considered at a meeting of the JUDGES in Easter term, 1828 (present Lord Tenterden, C. J., Best, C. J., Alexander, C. B., Bayley, Littledale, Gaselee, JJ., and Vaughan, B.), and the conviction was held wrong; the learned JUDGES thinking that to constitute the offence, it was essential that there should be an intent to injure or defraud some third person, not one identified with herself.

[1] [7 & 8 Geo. IV., c. 30, § 2.] And be it enacted, That if any person shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded, or shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

CHAPTER XLII.

FORGERY.

SECTION 1. WHAT IS A WRITING.

REGINA *v.* CLOSS,

7 Cox C. C. 494 [1857].

[INDICTMENT in three counts, of which the third was as follows]:—

. . . . . .

And the jurors aforesaid upon their oath aforesaid do further present, that before the time of the commission of the offence in this count hereinafter stated and charged, one J. Linnell of Redhill, in the county of Surrey, an artist in painting of great celebrity, and well known as such to the liege subjects of our Lady the Queen, had painted a certain large and valuable picture, whereon he had painted his name to denote that the said picture had been painted by the said J. Linnell; and the jurors aforesaid upon their oath aforesaid do further present, that the said T. Closs being a dealer in pictures, and being a person of fraudulent mind and disposition, and devising, contriving, and intending to cheat and defraud on the 24th day of July, in the year of our Lord, 1857, and within the jurisdiction aforesaid, unlawfully, wilfully, and wickedly did procure and have in his possession for the purposes of sale a certain painted copy of the said picture, on which said painted copy of the said picture was then and there unlawfully painted and forged the name of the said J. Linnell. And the jurors aforesaid upon their oath aforesaid do further present, that the said T. Closs, well knowing the name of the said J. Linnell so painted upon the said copy to be forged, did then and there, and within the jurisdiction aforesaid unlawfully, deceitfully, wickedly, and fraudulently offer, sell, dispose of, utter, and put off to the said H. Fitzpatrick the said painted copy of the said original painted picture with the name of the said J. Linnell so painted and forged thereon as aforesaid, and the said forged name of the said J. Linnell for a certain large sum of money, to wit, the sum of £130, to the great damage and deception of the said H. Fitzpatrick, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

It was objected by the prisoner's counsel in arrest of judgment that this count disclosed no indictable offence. . . .

M'Intyre for the prisoner. . . . As to the third count. The crime of forgery is defined in Russ. 318, to be "the fraudulent making or altering a writing to the prejudice of another man's right," and it clearly does not include this case. Forgery must be of the whole or of some material part of a written instrument. What was done here was no more than saying that the picture was painted by Linnell. But there cannot be a forgery of a picture. It may be imitated, but it cannot be forged. The name of "Linnell" is no more than a tree or a house painted upon it. It is part of the whole thing imitated, but it is not a forgery. Suppose a man were to put the name of Joseph Manton upon a gun, and pass it off as made by that maker, surely that would not be a forgery of the gun, although it might be a false pretence knowingly to obtain money by so representing it. The name of a painter on a picture is no more than a trademark on goods, and it has never yet been held that copying trademarks is forgery. The only subject of forgery here would be the signature, but there is no averment that there was any uttering of the forged signature as distinct from the picture, even if that would be an offence. Suppose in the case of the gun that it was really made by Manton, but that his name was put on it by some other person, could the instrument be said to be forged, when in truth it was genuine, and nothing about it was spurious except the trademark?

Metcalfe for the prosecution. . . . The third count is a good count for forgery. It shows that the signature of Linnell was a forgery, and that the prisoner knowingly put off the picture with the signature upon it. It is distinctly averred, therefore, that the prisoner uttered the signature if he uttered the picture with the signature attached. Suppose he had uttered a separate document, purporting to be a certificate of Linnell, signed by him, that the picture was of his painting, that would surely be a forgery, and the fact that such certificate is on the painting itself will not make it less a forgery; R. *v.* Toshack, 1 Dears. C. C. 285; 23 L. J. 51, M. C.; R. *v.* Sharman, 6 Cox C. C. 312.

COCKBURN, C. J. If you once go beyond a writing where are you to stop? Could there be a forgery of sculpture? There is here no allegation of a distinct uttering of the signature.

Metcalfe. There is a sufficient averment to sustain the indictment after verdict.

WILLIAMS, J. It is quite consistent with the facts here that the defendant sold the picture without calling attention to the signature.

Cur. adv. vult.

JUDGMENT.

COCKBURN, C. J., now delivered judgment as follows: The prisoner was indicted on a charge of having sold to one Fitzpatrick a picture as and for an original picture painted by Linnell, when in truth it was only a copy, and that he had passed it off by means of having the name "J. Linnell" painted in the corner of the picture in imitation of the original, which bore such signature. There were three counts in the indictment. The first was for obtaining money by false pretences, on which the prisoner was acquitted. The second was for a cheat at common law; and the third for a cheat by means of forgery at common law. As to the third count, we are all of opinion that that was no forgery. A forgery must be of some document or writing; but the name of Linnell in this case can only be regarded as an arbitrary mark put upon the picture by the painter to enable him to recognize his own work.

. . . . . .

REGINA *v.* SMITH.

8 Cox C. C. 32; DEARS and B., 566 [1858].

CASE reserved and stated by the recorder of London: —

John Smith was tried before me at the Central Criminal Court, upon an indictment charging him with forging certain documents, and with uttering them, knowing them to be forged.

It appeared that the prosecutor, George Borwick, was in the habit of selling certain powders, some called Borwick's baking powders, and others Borwick's egg powders.

These powders were invariably sold in packets, and were wrapped up in printed papers.

The baking powders were wrapped in papers which contained the name of George Borwick, but they were so wrapped that the name was not visible till the packets were opened.

It was proved that the prisoner had endeavored to sell baking powders, but had them returned to him because they were not Borwick's powders.

Subsequently he went to a printer, and representing his name to be Borwick, desired him to print ten thousand labels as nearly as possible like those used by Borwick, except that the name of Borwick was to be omitted in the baking powders.

The labels were printed according to his order, and a considerable quantity of the prisoner's powders were subsequently sold by him as Borwick's powders wrapped in those labels.

On the part of the prisoner it was objected that the making or uttering such documents did not constitute the offence charged in the indictment.

This point I determined to reserve for the consideration of the Court of Criminal Appeal, and I left it to the jury to find whether the labels so far resembled those used by Borwick as to deceive persons of ordinary observation, and to make them believe them to be Borwick's labels; and whether they were made and uttered by him with intent to defraud the different parties by so deceiving them; directing them in that case to find the prisoner guilty.

The jury found him guilty.

The labels marked "genuine" sent herewith were those used by the prosecutor; those marked "imitations" were the labels the subjects of this prosecution, and reference can be made to them if necessary.

The prisoner has been admitted to bail to await the decision of the Court for the consideration of Crown Cases upon the foregoing facts.

The following is a copy of the genuine baking powder label: —

PATRONIZED BY THE ADMIRALTY! BORWICK'S ORIGINAL GERMAN BAKING POWDER, FOR MAKING BREAD WITHOUT YEAST, AND PUDDINGS WITHOUT EGGS. (Directions improved by the Queen's private baker.)

By the use of this preparation, as the saccharine properties of the flour, which are destroyed by fermentation with yeast, are preserved, the bread is not only more nutritive, but a larger quantity is obtained from the same weight of flour.

Bread made with yeast, if eaten before it becomes stale, ferments again in the stomach — producing indigestion and numerous other complaints: when made with this powder it is free from all such injurious effects.

The powder is equally valuable in making puddings and pastry, which it deprives of all their indigestible properties; and if dripping or lard be used instead of butter, it removes all unpleasant taste.

It will keep any length of time and in any climate. In the sick hospital of the Crimea it was found invaluable.

The public are requested to see that each wrapper is signed George Borwick, without which none is genuine. Sold retail by most chemists in 1*d.*, 2*d.*, 4*d.*, and 6*d.* packets, and in 1*s.*, 2*s.* 6*d*, and 5*s.* tins. Wholesale by George Borwick, 24 and 25 London Wall, London. Directions on the other side.

The following is a copy of the imitation label used by the prisoner:

PATRONIZED BY THE ARMY AND NAVY! BORWICK'S ORIGINAL GERMAN BAKING POWDER, FOR MAKING BREAD WITHOUT YEAST, AND PUDDINGS WITHOUT EGGS. (Directions improved by the Queen's private baker.)

By the use of this preparation, as the saccharine properties of the flour, which are destroyed by fermentation with yeast, are preserved, the bread is

not only more nutritive, but a larger quantity is obtained from the same weight of flour.

Bread made with yeast, if eaten before it becomes stale, ferments again in the stomach — producing indigestion and numerous other complaints; when made with this powder, it is free from all such injurious effects.

This powder is equally valuable in making puddings and pastry, which it deprives of all their indigestible properties; and if dripping or lard be used instead of butter, it removes all unpleasant taste.

It will keep any length of time and in any climate. In the sick hospital of the Crimea it was found invaluable.

Sold retail by most chemists in 1*d.*, 2*d.*, 4*d.*, and 6*d.* packets, and in 1*s.*, 2*s.* 6*d.*, and 5*s* tins. Directions on the other side.

The directions indorsed on the backs of the two labels were *totidem verbis*.

The following is a copy of the genuine egg powder label: —

BORWICK'S METROPOLITAN EGG POWDER.

A vegetable compound, being a valuable substitute for eggs. One packet is sufficient for two pounds of flour and equal to four eggs.

Directions. — Mix with the flour, then add water or milk, for plum, batter, and other puddings, cakes, pancakes, etc. Price one penny. To be had of all grocers, oilmen, and cornchandlers.

The following is a copy of the egg powder label used by the prisoner:

BORWICK'S METROPOLITAN EGG POWDER.

A vegetable compound, being a valuable substitute for eggs. One packet is sufficient for two pounds of flour and equal to four eggs.

Directions. — Mix with the flour, then add water or milk, for plum, batter, and other puddings, cakes, pancakes, etc. Price one penny. To be had of all grocers, oilmen, and cornchandlers.

M'Intyre, for the prisoner. This is not a forgery either at common law or within the statute. The gist of the offence was the passing off for genuine baking powder that which was not so; in fact, something that was not so good. This was nothing more than a puff. In Regina *v.* Closs, 27 L. J. 54, M.C., it was held that a person could not be indicted for forging or uttering the forged name of a painter by falsely putting it on a spurious picture to pass it off as the genuine painting of the artist. This was no more than a printed label, and only differs from Regina *v.* Closs in that there the name was painted on the picture. In the case of Burgess's sauce labels the Court of Chancery refused to restrain the son from using labels with the father's name upon them. [POLLOCK, C. B. Suppose a man opened a shop and painted it so as exactly to resemble his neighbor's, would that be forgery?] No. The affixing this label to the powder amounts to no more than saying "This is Bor-

wick's powder." If the prisoner had had a license, he would have had a right to use the labels.

Huddleston (*Poland* with him), for the prosecution. The jury have found that the labels were made and uttered by the prisoner with intent to defraud. The definition of forgery at common law is "the fraudulent making or alteration of a writing to the prejudice of another man's right;" 2 Rus. on Crimes, 318; 4 Black. Com. 247; Stark. Crim. Law, 468; 2 East, P. C. c. 19, § 49, p. 965; and the finding of the jury brings this case within that definition. [CHANNELL, B. What was a document at common law which could be the subject of forgery? POLLOCK, C. B. Was a book of which another man made copies?] It is submitted that it was; Com. Dig. "Forgery." Letters may be the subject of forgery: Chit. Crim. Law, 1022. So a diploma of the College of Surgeons may be: Regina v. Hodgson, 7 Cox C. C. 122. So also the certificate of the examiners of the Trinity House: Regina v. Toshack, 1 Den. C. C. 492. So a letter of the character of a servant may be: Regina v. Sharman, 1 Dears. C. C. 285. Then this label is a certificate as to the character of an article: Regina v. Closs; R. v. Colicott, Russ. & Ry. 201; Stark. Crim. Law, 479, were also cited.

POLLOCK, C. B. We are all of opinion that this conviction is bad. The defendant may have been guilty of obtaining money under false pretences; of that there can be no doubt; but the real offence here was the issuing a false wrapper and inclosing false stuff within it. The issuing of this wrapper without the stuff within it would be no offence. In the printing of these wrappers there is no forgery; the real offence is the issuing them with the fraudulent matter in them. I waited in vain to hear Mr. Huddleston show that these wrappers came within the principle of documents which might be the subject of forgery at common law. Speaking for myself, I doubt very much whether these papers are within that principle. They are merely wrappers, and in their present shape I doubt whether they are anything like a document or instrument which is the subject of forgery at common law. To say that they belong to that class of instruments seems to me to be confounding things which are essentially different. It might as well be said that if one tradesman used brown paper for wrappers of the same description as another tradesman, he could be accused of forging the brown paper.

WILLES, J. I agree in the definition of forgery at common law, that it is the forging of a false document to represent a genuine document. That does not apply here, for it is quite absurd to suppose that the prisoner was guilty of ten thousand forgeries as soon as he got these wrappers from the printer; and if he had distributed them over the whole earth and done no more, he would have committed no offence.

The fraud consists in putting inside the wrappers powder which is not genuine, and selling that. If the prisoner had had one hundred genuine wrappers and one hundred not genuine, and had put genuine powder into the spurious wrappers and spurious powder into the genuine wrappers, he would not have been guilty of forgery. This is not one of the different kinds of instruments which may be the subject of forgery. It is not made the subject of forgery simply by reason of the assertion of that which is false. In cases like the present, the remedy is well known: the prosecutor may, if he pleases, file a bill in equity to restrain the defendant from using the wrapper, and he may also bring an action at law for damages; or he may indict him for obtaining money under false pretences. But to convert this into the offence of forgery would be to strain the rule of law.

Bramwell, B. I think that this was not a forgery, even assuming that the definition of forgery at common law is large enough to comprehend this case. Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other. In the present case one of these documents is as good as the other — the one asserts what the other does — the one is as true as the other, but the one is improperly used. But the question now is, whether the document itself is a false document. It is said that the one is so like one used by somebody else that it may mislead. That is not material, or whether one is a little more true or more false than the other. I cannot see any false character in the document. The prisoner may have committed a gross fraud in using the wrappers for that which was not the genuine powder, and may possibly be indicted for obtaining money by false pretences, but I think he cannot be convicted of forgery.

Channell, B. concurred.

Byles, J. Every forgery is a counterfeit. Here there was no counterfeit. The offence lies in the use of it. *Conviction quashed.*

COMMONWEALTH *v.* RAY,

3 Gray, 441, 446.

Section 2. The Character of the Writing.

REGINA *v.* MOAH,

7 Cox C. C. 503.

REGINA *v.* SHARMAN,

6 Cox C. C. 312.

REGINA *v.* TOSHACK,

4 Cox C. C. 38.

REX *v.* HARRIS,

1 Moo. C. C. 393.

REX *v.* HAWKESWOOD,

Leach C. C. 292.

REX *v.* RECULIST,

Leach C. C. 811.

Section 3. The Essence of Forgery Fictitiousness, not Untruthfulness.

EX PARTE WINDSOR,

10 Cox C. C. 121 [1865].

COURT OF QUEEN'S BENCH.

[Before Cockburn, Blackburn, and Shee, JJ.]
[Habeas Corpus, — Application for Extradition.]

. . . . . .

It appeared that . . . Windsor had been a clerk in "The Mercantile Bank of New York," in the United States of America, and that whilst in that capacity he was under suspicion of having made false entries in the bank-books to conceal certain embezzlements. By the law of the State of New York this is declared to be a forgery in the third degree.

. . . . . .

Blackburn, J. . . . The only power that the extradition treaty gives to surrender a prisoner is that derived from the statute; and that statute, as far as I see, does not enact that all fugitives from justice shall be given up, but only those who have committed certain enumerated crimes — it provides for the delivery of any person charged with the crime of murder, assault with intent to commit murder, the crime of piracy, arson, robbery, and forgery; these, both in the treaty and the statute passed to give effect to it, are the defined cases given by those high contracting parties to the treaty on which to deliver over prisoners to each other. Now the charge that is made out against this person is that he, being a clerk in a bank, did steal a large sum of money, and in order to conceal it did make an entry in a book, which entry, as I make it out, was an entry stating on his

behalf that a certain quantity of specie had been deposited in the vaults, whereas, in point of fact, the statement was wilfully and fraudulently false, with the intention to conceal and embezzle. But though he was guilty of that crime, it did not amount to forgery. Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery because it is reduced into writing. The guilt of the thing which he has done is by no means more than that. He has not made any statement that is purported to be made by the authority of any person on behalf of that person. Now this man has made a false statement, falsely stating a fact which purports to be what it is. It is quite true that the State of New York by statute has enacted that those guilty of this offence shall, on conviction, be deemed guilty of forgery in the third degree. I pass by, without entering into them, the various observations that have been made to show that this did amount to this crime within the New York State; I am inclined to think it would be certainly a crime in the New York State. But then if this is not forgery, how does the fact that the local State of New York in the United States has declared in effect that he shall be deemed guilty of forgery, make it forgery within the meaning of the extradition statute? That, I think, we cannot do. I think we must construe this statute and the treaty between the two high contracting parties, Her Majesty the Queen of Great Britain on the one part and the United States on the other part, as a bargain and treaty; but that bargain, notwithstanding the dignity of the parties, must be understood like every other contract according to the meaning of the words fairly understood and the intention expressed by them in terms, both parties using the same English language and both speaking of the same sort of thing as to the particular crimes for which prisoners shall be given up, — murder, piracy, and forgery. . . . I do not think, if either country was to declare that some particular offence shall be a forgery, or called a forgery, that this will do. The true and fair meaning of the local statute is merely, that he who commits a crime, though not forgery in itself, shall be punished as if he had committed forgery. In this case the man who is guilty of a crime is a fugitive, and we might wish that the Legislature gave us the power to give up any criminals who committed a great crime; but that has not been done. I agree with my Lord that he is to be discharged, so far as this ground of objection is concerned.

. . . . . .

REGINA *v.* WHITE,

2 Cox C. C. 210 [1847].

CROWN CASE RESERVED.

[Indictment for Forgery of a Bill of Exchange.]

. . . . . .

The bill was dated on the 19th of August, 1846, at three months. It professed to be drawn by Mathew Clarkson on William Nicholson, payable to his own order, and to be accepted by William Nicholson and indorsed by Mathew Clarkson, and then, *per procuration*, Thomas Tomlinson, Emanuel White.

Alfred Thomas Fellowes was called: I am a partner with Thomas Hart in a bank at Nottingham. On the 1st of September, 1846, the prisoner came to our bank with this bill, which he asked me to discount. He said he had brought it to be discounted; that he came from Mr. Tomlinson. I called in a clerk (Newton), who said he knew him, that he sometimes came from Mr. Tomlinson, who was very good, so I discounted it. I told the prisoner Mr. Tomlinson had not indorsed it. He said Mr. Tomlinson was from home, but that he could indorse it for him. I asked him if he could, and he said "Yes." I asked Mr. Tomlinson's Christian name; he said "Thomas." I wrote "*per procuration* Thomas Tomlinson." He said he would sign his name; he did sign his name, and I gave him the money.

. . . . . .

In Trinity term, the Judges who heard the argument assembled to consider the case, and unanimously held that the prisoner's offence was not forgery. . . .

COMMONWEALTH *v.* HENRY W. BALDWIN,

11 Gray, 197 [1858].

Thomas, J. This is an indictment for the forgery of a promissory note . . . of the following tenor: —

$457.88. Worcester, Aug. 21, 1856.

Four months after date we promise to pay to the order of Russell Phelps four hundred fifty seven dollars $\frac{88}{100}$, payable at Exchange Bank, Boston, value received. Schouler, Baldwin & Co.

. . . . . .

Russell Phelps testified that the note was executed and delivered by the defendant to him at the Bay State House in Worcester, on the 21st of August, 1856; . . . and that in reply to the inquiry who were the members of the firm of Schouler, Baldwin & Co., the defendant said, "Henry W. Baldwin, and William Schouler of Columbus." He further said that no person was represented by the words "& Co." . . . The government offered evidence which tended to prove either that there never had been any partnership between Schouler and Baldwin, the defendant, or, if there ever had been a partnership, that it was dissolved in the month of July, 1856.

The question raised at the trial and discussed here is whether the execution and delivery of the note, under the facts stated, and with intent to defraud, was a forgery.

. . . . . .

The writing alleged to be forged in the case at bar was the handwriting of the defendant, known to be such and intended to be received as such. It binds the defendant. Its falsity consists in the implication that he was a partner of Schouler and authorized to bind him by his act. This, though a fraud, is not, we think, a forgery.

Suppose the defendant had said in terms: "I have authority to sign Schouler's name," and then had signed it in the presence of the promisee. He would have obtained the discharge of the former note by a false pretence, a pretence that he had authority to bind Schouler. "It is not," says Sergeant Hawkins, "the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery." 1 Hawk. c. 70, § 5.

If the defendant had written upon the note, "William Schouler by his agent Henry W. Baldwin," the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon his signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature. He relied upon the defendant's statement of his authority to bind him as partner in the firm of Schouler, Baldwin & Co. Or if the partnership had in fact before existed but was then dissolved, the effect of the defendant's act was a false representation of its continued existence.

In the case of Regina *v.* White, 1 Denison, 208, the prisoner indorsed a bill of exchange, "per procuration, Thomas Tomlinson, Emanuel White." He had no authority to make the indorsement, but the twelve judges held unanimously that the act was no forgery.

The *nisi prius* case of Regina *v.* Rogers, 8 Car. & P. 629, has some resemblance to the case before us. The indictment was for uttering a forged acceptance of a bill of exchange. It was sold and delivered by the defendant as the acceptance of Nicholson & Co. Some evidence was offered that it was accepted by one T. Nicholson in the name of a fictitious firm. The instructions to the jury were perhaps broad enough to include the case at bar, but the jury having found that the acceptance was not written by T. Nicholson, the case went no further. The instructions at *nisi prius* have no force as precedent, and in principle are plainly beyond the line of the settled cases.

The result is that the exceptions must be sustained and a new trial ordered in the common pleas. It will be observed, however, that the grounds on which the exceptions are sustained seem necessarily to dispose of the cause. *Exceptions sustained.*

SECTION 4. INSTANCES OF FICTITIOUSNESS AS DISTINGUISHED FROM MERE UNTRUTHFULNESS.

REX *v.* MARSHALL,

RUSS. & RY. 75 [1804].

THE prisoner was tried before Mr. Baron Graham, at the York Summer assizes, in the year 1804.

The indictment charged that the prisoner Thomas Marshall, on the 12th of March, 1804, at the parish of Kirkby Overblow, on a bill of exchange, on which was then contained an indorsement as follows, "Joseph Ward," and which bill of exchange was as follows: —

No. 654. £28. YORK, Feb. 24, 1804.

Two months after date, pay Mr. Joseph Ward, or order, twenty-eight pounds, value received, as advised by EDWARD PRATT.

Messrs. Fuller & Co.
Bankers, London.

did falsely make, forge, and counterfeit, an indorsement of the said bill of exchange, as follows: "Luke Marsden," with intention to defraud one Peter Harland.

The prisoner came to the house of the prosecutor, Peter Harland, at Kirkby Overblow, in the afternoon of the 12th of March, 1804, to buy a horse. Harland sold him one for £38. When the bargain was made, the prisoner produced the bill for £28, with other good guinea notes. Harland said he asked no question about the indorsement, but seeing that it was drawn on a good bank in London, desired the prisoner to

give him his name on the back. The prisoner took up pen and ink, and wrote in Harland's presence, "Luke Marsden," on the back. Harland asked him, after he had made the bargain, where he lived. He said in York; and Harland made no further inquiry, living twenty miles from York. Harland indorsed the bill: it was sent to London, and returned to him unpaid. The other names on the bill, before "Luke Marsden," and particularly that of Joseph Ward, were there before the prosecutor took the bill.

The prosecutor said he knew nothing of the prisoner, or any Luke Marsden; that he supposed he wrote his own name, but that had he written John Roberts, he should not have refused the bill.

It was proved that the prisoner had lived at York for a few years, under the name of Thomas Marshall, but had left it about a year and a half or two years. That his real name was Thomas Marshall, and that he had never, to the knowledge of the witnesses, gone by the name of Luke Marsden.

The jury, under the learned judge's direction, found the prisoner guilty, and sentence was passed on him, but respited under a doubt whether forgery of the name of the maker or indorser of a bill or note did not import the assumption of the character and credit of another person, and upon a difficulty of reconciling the cases of Rex *v.* Shepherd,[1] Rex *v.* Aickles,[2] Rex *v.* Lockitt, and Rex *v.* Abrahams,[3] Rex *v.* Tuft,[4] and Rex *v.* Taylor.[5]

In Michaelmas term, 10th of November, 1804, all the JUDGES (except Heath and Chambre, Js.) being present, it was decided that the conviction was right, it appearing that there was no doubt as to the intent to defraud.

REX *v.* WHILEY,

RUSS. & RY. 90 [1805].

REX *v.* LOCKETT,

1 LEACH C. C. 110 [1772].

AT the Old Bailey in June Session, 1772, Charles Lockett was tried before Mr. Baron Perrott, present Mr. Justice Aston, for forging an order for the payment of money; and also for uttering it, knowing it to be forged, with intention to defraud one John Scholes, etc. The order was in the words and figures following: —

[1] 2 East, P. C. 967. [2] Ibid. 968. [3] Ibid. 940, 941.
[4] Ibid. 959. [5] Ibid. 960.

London, Feb. 14, 1772.

Messrs. Neale, James, Fordyce, and Down,

Pay to Mr. William Hopwood, or bearer, sixteen pounds ten shillings and sixpence.

£16, 10*s.*, 6*d.* R. Vennist.

The prisoner went to the shop of Mr. Scholes, a colorman, and bargained for a quantity of goods, amounting to £10, 0*s.* 6*d.* He desired a bill might be made out, and said he would call in the afternoon and pay for them. He went away and took a small parcel of Prussian blue with him. He returned in the afternoon, seemingly in a great hurry; said his name was William Thompson, and that he lived at Ware, in Hertfordshire. He presented the order to pay for the goods, and Mr. Scholes gave him six pounds ten shillings in difference; but on presenting it for payment, no man of the name of R. Vennist had ever kept cash at the house of Neale, James, Fordyce, and Down; nor did the prosecutor know any such person existing; and it was in fact a fictitious name.

The jury found the prisoner guilty of uttering the order, knowing it to be forged; but as it appeared that no man of the name of Vennist had ever kept cash with these bankers, it was doubted whether this was an order for the payment of money within the meaning of the Statute of 7 Geo. II. c. 22, the principle of Mary Mitchell's Case[1] being that the words "warrant or order," as they stand in the Act, are synonymous, and expressive of one and the same idea, and in common parlance import that the person giving such warrant or order hath, or at least claimeth an interest in the money or goods which are the subject-matter of that warrant or order; that he hath, or at least assumes to have, a disposing power over such money or goods, and takes on him to transfer the property, or custody of them at least, to the person in whose favor such warrant or order is made.

Upon this doubt, the case was referred to the consideration of the Judges; and in September Session, 1774, Mr. Baron Perrott delivered their opinion to the following effect: the judges are unanimously of opinion, That it is an order for the payment of money within the meaning of the statute; for although no man of the name of Vennist had in fact ever kept cash at Fordyce's banking-shop, yet the nature of the order assumes that there was cash there in the name of the drawer, which he had taken upon him to transfer to the person in whose favor the order is made; for it would be a very forced construction of the statute to say, that the forgery of a *fictitious name*, with intention to defraud, is not within the intention of it.

. . . . . .

[1] Foster, P. C. 119.

REGINA *v.* ELIZABETH DUNN,

LEACH C. C. 59 [1765].

REX *v.* TUFT,

1 LEACH C. C. 206 [1777].

AT the Lent Assizes for the county of Leicester, 1777, Edward Tuft was tried before Mr. Justice Nares, for forging an indorsement on a bill of exchange. The jury found the prisoner guilty; but the learned and humane judge, cautious of passing sentence of death in a case which admitted of doubt, submitted to the consideration of the twelve judges, whether, upon the following state of facts, the conviction was proper.

The bill of exchange was the property of one William Wetheral, out of whose pocket it had been picked or lost, with other things at Leicester races. The prisoner had the very same night endeavored to negotiate it at Leicester; but being disappointed, he proceeded to Market Harborough, where he bought a horse of one John Ingram, the landlord of the inn, and offered him this bill to change. The landlord not having cash sufficient in the house, carried it to a banker's in the town, where the clerk told him that it was very good paper, for that he knew the payee who had indorsed it, and that if he (the landlord) would put his name on the back of it, it should be immediately discounted. The landlord however, not knowing the person from whom he had received it, refused to indorse it; but told the clerk that the gentleman was then at his house, and he would go and fetch him: accordingly he went to the prisoner, who accompanied him to the banker's. The clerk then told the prisoner, that it was the rule of their shop never to take a discount bill unless the person offering such bill indorsed it; and therefore if he (the prisoner) would indorse it, it should be discounted. The prisoner immediately indorsed it by the name of "John Williams," which was not his own name, and the banker's clerk, after deducting the discount, gave him the cash for it. The prisoner, in his defence, said he had found it.

The JUDGES were unanimously of opinion that this was a forgery; for although the fictitious signature was not necessary to his obtaining the money, and his intent in writing a false name was probably only done to conceal the hands through which the bill had passed, yet it was a fraud both on the owner of the bill, and on the person who discounted it. The one lost the chance of tracing his property, and the other lost the benefit of a real [traceable?] indorser, if, by accident, the prior indorsements should have failed.

REGINA *v.* SHEPPARD,

1 LEACH, C. C. 265 [1781].

REGINA *v.* MARTIN,

14 Cox C. C. 375; 5 Q. B. D. 34 [1879].

CROWN CASES RESERVED.

CASE reserved for the opinion of this Court by Cockburn, C. J. The prisoner, Robert Martin, was tried before me at the late assizes held at Maidstone on an indictment which charged him in one count with having forged, in another with having uttered, a forged order for the sum of £32 with intent to defraud. The facts were as follows: —

The prosecutor, George Lee, is a horse dealer at Ashford, in Kent. The prisoner Martin had been for many years collector of the tolls of the markets of Ashford and Maidstone, and was well known to the prosecutor. In the course of the present year the prisoner, having ceased to hold the above-mentioned office, left the neighborhood, and went to reside in Southwark. On the 2d day of September, being again at Ashford, for what purpose did not appear, he saw the prosecutor Lee in the street in a pony cart, and accosted him, inquiring if he (Lee) had a pony for sale, whereupon the prosecutor recommended him to buy the pony he was then driving. A deal ensued, the result of which was that the prosecutor agreed to sell, and the prisoner to buy, the pony and carriage for £32.

The prisoner proposing to give his check for the amount, both parties went into an adjoining inn, in order that the check might be there drawn. The prisoner then produced a printed form of check of the bank of Messrs. Wigan & Co., bankers, of Maidstone, taken from a check-book, of which he had become possessed as a former customer of the bank. This he filled up in the presence of the prosecutor with the name of the latter as payee, signed it in the name of William Martin, his name being Robert, and delivered it to the prosecutor, who put it in his pocket without further looking at it, or observing in what name it was signed, after which he proceeded to give possession of the pony and carriage to the prisoner. On the ensuing morning the prisoner drove the pony and carriage to town, and on the day after drove to Barnet Fair, where he sold both. On the check being presented at Messrs. Wigan's bank payment was refused on the ground that the signature was not that of any customer of the bank.

The prisoner had been a customer of the bank, and had had an account there in his proper name of Robert Martin, but his account re-

maining overdrawn for some time after he had ceased to be the collector of the market tolls, and the bank insisting on the balance due to them being paid, the amount was accordingly paid on the 4th day of June, and the account was then closed. No money was afterwards paid in to prisoner's credit, nor was any check drawn by him. He asserted indeed in his defence on this charge that he had expected money to have been paid in to his account, but no evidence was adduced to show that there was any foundation for this statement. No name was mentioned of any person owing him money, or by whom he expected money to be paid into the bank on his account. He had ceased to all intents and purposes to be a customer of the bank, and must have been fully aware that a check drawn by him on the bank would certainly be dishonored.

Under these circumstances there can be no doubt that the prisoner had been guilty of the offence of obtaining the prosecutor's goods by false pretences. But the indictment being for forgery of the check, and it appearing to me doubtful whether the charge of forgery could upon the facts proved be upheld, I reserved the case for the consideration of this Court.

In considering this question I have further to call attention to the following facts: —

The prisoner in drawing this check and delivering it to the prosecutor did not do so in the name of or as representing any other person, real or fictitious. The check was drawn and uttered as his own, and it was so received by the prosecutor, to whom the prisoner was perfectly well known as an acquaintance of twenty years' standing, and by whom he was seen to sign it. The prisoner did not obtain credit with the prosecutor by substituting the Christian name of William for that of Robert. He would equally have got credit had he signed his proper name of Robert. The credit was given to the prisoner himself, not to the name in which the check was signed. The check was taken as that of the individual person who had just been seen to sign it, not as the check of William Martin, as distinguished from Robert Martin, or of any other person than the prisoner. On the contrary, if the prosecutor, who knew the prisoner's name to be Robert, had observed that the signature was in the name of William, he would in all probability have suspected something wrong, and would have refused to take the check.

There was nothing whatever from which the motive of the prisoner in signing a wrong Christian name could be gathered. There happened, indeed, to be a William Martin, a customer of the bank; but this was unknown to the prisoner; besides which, as the prisoner was perfectly aware that his person and true name were well known to the prose-

cutor, it could not be supposed that he intended to pass himself off as, or the check as the check of, any William Martin other than himself. The only motive which has occurred to my mind as one which might have induced him to sign a false Christian name is that he may have thought that by so doing he might avoid being liable on the check when payment had been, as it was certain to be, refused. This, however, amounts to no more than conjecture. Be it as it may, and whatever may have been the motive, it occurred to me that, while there had been a fictitious signature to the check in question, so far as the Christian name was concerned, yet the signature having been affixed by the prisoner, and the check delivered by him as his own, though there had been a signature in a fictitious name, the name could not be said to be that of a fictitious person; and that, in this respect, the case did not fall within the principle of the cases in which it has been held that the use of the pretended name of a fictitious person amounts to forgery.

I have therefore sought the assistance of the Court as to whether, under the circumstances, the affixing a fictitious Christian name to this check by the prisoner amounts to forgery as charged in the indictment.

A. E. COCKBURN.

No counsel was instructed to argue.

COCKBURN, C. J. The conviction must be quashed. This case is concluded by authority. In Dunn's Case, 1 Leach C. C. 57, the judges agreed "that in all forgeries the instrument supposed to be forged must be a false instrument in itself, and that if a person give a note entirely as his own his subscribing it by a fictitious name will not make it a forgery, the credit there being given to himself without any regard to the name or without any relation to a third person." That exactly applies to this case.

LUSH, J. I had the same question before me at the last Autumn assizes, and I directed an indictment for false pretences to be preferred.

COCKBURN, C. J. That ought to have been done in this case.

HUDDLESTON, B., LINDLEY, and HAWKINS, J. J., concurred.

Conviction quashed.

COMMONWEALTH *v.* FOSTER,

114 MASS. 311 [1873].

[INDICTMENT containing the four counts, each for uttering a forged promissory note. The note described in the first count was signed "Little & Co."]

. . . . . .

At the trial in the Superior Court, before Bacon, J., the government called one George P. Little, who testified as follows: —

"I am a broker at No. 10 State Street; have been in business for three years in State Street; at one time I was at No. 93 Washington Street, and at another time I was at No. 26½ Exchange Street; I was trading in real estate; have known defendant half a dozen years; defendant sent for me to come down to his office, No. 130 State Street, and I went down; he said he wanted me to make a large note; I said I had done business under the name of Little & Co., and he told me to sign it 'Little & Co.,' and I did so, and made the note so signed, described in the first count; I gave the note to Foster, and he gave me ten dollars; I had no wrong intention in making the note; in trade it is sometimes done, that is, notes of this kind are made; the note was made August 12, 1871."

Ebenezer N. Chaddock was then called, and said he was eighty years of age, and used to follow the sea. "In August, 1871, I held Foster's notes for a large amount; saw the note signed 'Little & Co.' at Foster's office on the twelfth or thirteenth of August, 1871, and took it of him and gave him up other notes of his and some Hicksville stock that I had for it. He indorsed the note, waiving demand and notice, and gave it to me. He represented that this Little & Co. was a large firm doing business on Franklin Street, in Boston, and that they had a large manufactory in Charlestown." . . .

David G. Ranney testified: "Am a member of the firm of James L. Little & Co., on Franklin Street; the members of our firm are James L. Little, James M. Dunbar, David G. Ranney, F. W. Haynes, James L. Little, Jr., Joseph A. Tilden; we have been thirteen years in Franklin Street; no such firm as Little & Co. that I know of; this 'Little & Co.' note in the first count is not made by our firm, nor any member of it."

. . . . . .

The defendant requested the Court to instruct the jury as follows: —

"1. That if the jury find that the note signed 'Little & Co.' was signed by Geo. P. Little, who had formerly been a member of the firm of Little & Co., and it not appearing that there was any other firm of the name of Little & Co., the note could not be regarded as a forgery, and therefore the defendant could not be convicted of uttering forged paper under the first count in the indictment.

"2. That the note signed 'Little & Co.' being the genuine signature of Geo. P. Little, no statements by the defendant as to the members of that firm could make said note a forgery, however false those statements may have been, provided it is not proved that there was in point of fact another firm in Boston doing business under the name of Little

& Co., and therefore the defendant cannot be convicted of uttering a forged note under the first count in the indictment."

. . . . . .

WELLS, J. Two questions are presented by the instructions in regard to the note signed "Little & Co." First, whether the fact that the manual operation of attaching the signature was performed by a person of the name of Little who had done business under the name of Little & Co. is incompatible with a verdict finding the note to be a forgery. Second, whether it may be found to be a forgery on the part of one who procures it to be so made, intending to use it as the note of some other party or pretended party and thereby defraud another, although Little was innocent of fraudulent intent, and signed the note without understanding the purpose for which it was procured.

Forgery is not necessarily counterfeiting. One definition quoted approvingly in Commonwealth *v.* Ray, 3 Gray, 441, is "the making a false instrument with intent to deceive." In The King *v.* Parkes, 2 Leach (4th ed.), 775, it is defined as "the false making a note or other instrument with intent to defraud."

By Gen. Sts. c. 162, § 1, "whoever falsely makes" a promissory note, "with intent to injure or defraud any person" is punishable as for the offence of forgery. The falsity of the instrument consists in its purporting to be the note of some party other than the one actually making the signature. The falsity of the act consists in the intent that it shall pass and be received as the note of some other party. If there be simulation, or any device in or upon the instrument itself, adopted to make it appear to be the note of such other party, so that the falsity and its proof are both borne upon it, no one would doubt that the charge of forgery might be maintained, notwithstanding that the signature is of a name which might lawfully be used by the person who attached it to the note.

It matters not by whom the signature is attached, if it be not attached as his own. If the note is prepared for the purpose of being fraudulently used as the note of another person, it is falsely made. The question of forgery does not depend upon the presence upon the note itself of the *indicia* of falsity. If extrinsic circumstances are such as to facilitate the accomplishment of the cheat without the aid of any device in the note itself, the preparation of a note with intent to take advantage of those circumstances and use it falsely is "making a false instrument." If Little & Co., "a large firm doing business on Franklin Street, Boston," and "having a large manufactory in Charlestown," were well known and in undoubted credit, and the Little & Co. of George P. Little were of no credit and entirely unknown, and George P. Little made and signed the note, not as his own or as the note of his firm, but solely with a view to its use as the defendant in this case

used it, all the elements, both of effect and intent, necessary to constitute the offence of forgery, would exist. The position of the case is the same, if the party defrauded knew nothing of either firm except from the representations of the defendant; and the supposed makers of the note did not in fact exist at all. United States *v.* Turner, 7 Pet. 132.

The distinction is plainly drawn in Commonwealth *v.* Baldwin, 11 Gray, 197, between one who assumes to bind another, either jointly with himself, or by procuration, however groundless and false may be his pretence of authority so to do, and one who signs in such manner that the instrument may purport to bear the actual signature of another party having the same name, and intending that it shall be so received. It purports to be the instrument of such other party, among those not familiar with his handwriting, by bearing his name; and it is a false instrument, and falsely made, if it was so intended. Commonwealth *v.* Stephenson, 11 Cush. 481.

The second question is, in a measure, involved in the first. To constitute forgery, where there has been no subsequent alteration, the fraudulent intent must attend the making of the instrument. But it is not necessary that it should be in the mind of the one whose hand holds the pen in writing the signature. If that is done at the dictation or request of another, and for his purposes and use, and his designs are fraudulent so as to make it forgery if he had written it himself, then the instrument is a forged one. Commonwealth *v.* Stevens, 10 Mass. 181; Commonwealth *v.* Ray, 3 Gray, 441. The circumstance that the person so employed bore the same name as that subscribed to the instrument makes it necessary that it should be made to appear not to have been a genuine transaction; and that the signature was not attached to the paper as a contract of the one who wrote it. If he signed it without understanding its purpose, thoughtlessly, or from unfamiliarity with business matters, or being himself deceived, he might not be guilty of a criminal offence, and yet the instrument might be a forgery, so that one who procured it to be so made might be convicted either of the crime of forgery or of uttering a forged instrument.

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Exceptions overruled.

SECTION 5. UNTRUTHFULNESS AMOUNTING TO FICTITIOUSNESS. (ANTEDATING INSTRUMENTS.)

REX *v.* LEWIS,

FOSTER, C. C. 116.

REGINA *v.* RITSON,

11 Cox C. C. 352.

CHAPTER XLIII.

Uttering Forged Writings.

REGINA *v.* HEYWOOD,

2 C. & K. 352 [1847].

The prisoner was indicted for uttering a certain writing as and for a copy of a marriage certificate, he knowing the same to be forged.

The prisoner was indicted under the 11 Geo. IV. & 1 Will. IV., c. 66, § 20, which enacts, "That if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any register of baptisms, marriages, or burials, which hath been or shall be made or kept by the rector, vicar, curate, or officiating minister of any parish, district parish, or chapelry in England, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter in any such register any entry of any matter relating to any baptism, marriage, or burial, or shall utter any writing as and for a copy of an entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such writing to be false, forged, or altered . . . every such offender shall be guilty of felony," etc.; and the facts of the case were as follow: The prisoner, who was a printer, had been paying his addresses to one H. B., who had become pregnant by him; and, in order that the father of H. B. might be induced to consent to her cohabiting with the prisoner, the latter procured the marriage-lines of another person, printed a copy thereof, leaving certain blanks, and filled up these blanks with his own name and that of H. B., at the same time adding the name of the parish clergyman as having performed the ceremony, and that of the parish clerk, as having been witness thereof. He then gave the pretended certificate, so filled up, to H. B., in order that she might show it or give it to her father, and this H. B. accordingly did.

On these facts being stated in the opening of the case for the prosecution,

Alderson, B., said: If you can show no uttering, except to H. B., who was herself a party to the transaction, I think you will fail to show an uttering within the statute. It is like the case of one accomplice delivering a forged bill of exchange to another, with a view to uttering it to the world.

Accordingly the prisoner was acquitted.

REGINA *v.* RADFORD,

1 Den. C. C. 59 [1844].

CROWN CASE RESERVED.

Joseph Radford was convicted before Mr. Baron Gurney, at the Winter assizes for the county of Chester, A.D. 1844, for uttering a forged receipt for £ 5 14*s.* 6*d.*, in different counts, with intent to defraud Mr. Lee, George Turner, and others.

The prisoner was a stonemason, and purchased stone at a quarry the property of Mr. Lee.

At the time of the dealing the quarry was managed by George Turner.

The prisoner incurred the debt of £ 5 14*s.* 6*d.* on the 6th July, 1840. An invoice was sent without any receipt.

The prisoner was repeatedly applied to for payment, and made repeated promises of payment.

At last, in July, 1844, he for the first time alleged that he had paid for the stone at the time (1840) and that he had a receipt signed by Turner.

On this Forster, who had succeeded Turner as manager, went over to him 17th August, the prisoner produced the receipt and exhibited it to him to look at, but would not part with it out of his hand.

On the 21st August, Forster returned to him taking Turner with him, and again called on him to produce the receipt. He did produce and held it up for him and Turner to look at, but refused to part with it out of his hand. Mr. Forster, however, got it from him and he was apprehended.

Townsend, for the prisoner, contended that this was not an uttering, and cited the case of Rex *v.* Shukard, Russ. & Ry. 200.

The learned Baron inclined to think that the exhibiting it to the person with whom he was claiming credit for it was an uttering and publishing, even though he had not parted with it out of his hand, but he forbore passing sentence, and reserved the point for the consideration of the Judges.

On the evening of Feb. 14, 1845, the case was argued at Serjeants' Inn before eleven of the Judges.

. . . . . .

The Court took time to consider.

The Judges were of opinion that there was an uttering; and that the conviction was right. At the following Spring assizes the prisoner was sentenced. . . .

REGINA *v.* ION,

2 DEN. C. C. 475 [1852].

CROWN CASE RESERVED.

AT a session of Oyer and Terminer and Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, in December, 1851, William Ion was tried before the Right Hon. J. S. Wortley, Recorder of London, upon an indictment for feloniously uttering, disposing of, and putting off a forged receipt for £2 4*s*., knowing, etc., with intent to defraud.

It appeared in evidence that the prosecutor, James Dwyer, was a money lender; that one James Gillard had applied to him for a loan of money, and had proposed the prisoner as a surety for the amount. That thereupon the prosecutor proceeded to the house of the prisoner for the purpose of satisfying himself as to the prisoner's responsibility, and with this object required the production of the prisoner's receipts in respect of that house. That the prisoner, with the view of causing the money to be advanced to Gillard (who was found to be a man of no responsibility) upon their joint security, produced to Dwyer and placed in his hands (but for the purpose of inspection only) three documents purporting to be receipts for poor rates in respect of the said house, one of which was the forged receipt in question. The prosecutor inspected these documents, the prisoner remaining present during such inspection; he then received back the documents from the prosecutor and placed them upon a bill file. The foregoing facts comprised the uttering, disposing of, and putting off mentioned in the indictment.

It was objected upon the trial that these facts did not amount to an uttering, disposing of, or putting off sufficient to support the indictment.

The learned Recorder, however, ruled the contrary, and as the other necessary facts were proved to the satisfaction of the jury, they found the prisoner guilty. The jury also found, expressly in answer to a question put to them, that the prisoner placed the receipt in the hands of the prosecutor for the purpose of fraudulently inducing him to advance the money to Gillard.

Considering it doubtful whether he was correct in his ruling, the learned Recorder postponed judgment upon the indictment, and committed the prisoner to the jail of Newgate, in order that the

opinion and decision of the judges might be taken upon a case to be stated.

On the 24th April, A.D. 1852, this case was argued before JERVIS, C. J., ALDERSON, B., COLERIDGE, J., WIGHTMAN, J., and TALFOURD, J.

. . . . . .

On the 29th May, A.D. 1852, the judgment of the Court was given by Lord CAMPBELL, C. J.

We are of opinion that this conviction ought to be affirmed. Upon consideration there clearly seems to us to have been an uttering of the forged receipt within the meaning of 11 Geo. IV. & 1 Wm. IV. c. 66, § 10.

If it had been used in the manner stated for the direct purpose of gaining credit for the payment which it purports to vouch, there can be no doubt, since the case of R. *v.* Radford,[1] that there would have been a sufficient uttering. But the prisoner's counsel contended that there cannot be an uttering of a forged receipt unless it be used directly to gain credit upon it by its operating as a receipt; so that merely using this receipt for the purpose proved, to induce a belief that he had paid the money, and therefore was a man of substance, does not amount to an uttering within this act of Parliament. R. *v.* Shukard,[2] which was mainly relied upon for this distinction, does not seem to us to support it. That case is entitled to the highest respect, and upon similar facts we should submit to its authority. But the learned Judges there did not proceed upon the distinction that to make the using of a forged negotiable instrument a felonious uttering, the intention of the prisoner must be to gain credit upon it by making it operate as such. They appear to have thought that there the evidence was not sufficient to show an intention in the prisoner to induce the innkeeper to advance any money or to give credit upon it to him. The doctrine supposed to be established by that decision is, "that in order to make it an uttering it should be parted with or tendered or used in some way to get money or credit upon it." The words "upon it" we consider as equivalent to "by means of it;" otherwise there could hardly be an uttering of Court rolls and other instruments enumerated in the statute.

In the present case it is expressly found "that the prisoner placed the receipt in the hands of the prosecutor for the purpose of fraudulently inducing him to advance money to Gillard." This was a using of the forged receipt to get money upon it or by means of it, as much as if the prisoner himself had been to the borrower of the money, and the receipt had purported that he had paid the rates, and the prosecutor had thereupon advanced him a sum of money, and had been cheated out of it by him.

[1] Den. C. C. 59. [2] Russ. & Ry. 200.

We, therefore, think that the conviction was according to decided cases and sound principles of law.

REGINA *v.* TAYLOR,

4 F. & F. 511; ABOVE, p. 125.

REGINA *v.* FINKELSTEIN,

16 COX C. C. 107; ABOVE, p. 127.

CHAPTER XLIV.

LIBEL.

THE KING *v.* D. W. HARVEY AND CHAPMAN,

2 B. & C. 257 [1823].

THIS was an information filed by his Majesty's Attorney-General against the defendants, for a libel, contained in a newspaper of which the defendant Harvey was the proprietor and the other defendant the printer and publisher. The libel was the leading article in the paper, and headed "Latest Intelligence — The King," and began in the following words: "Attached as we sincerely and lawfully are to every interest connected with the sovereign, or any of his illustrious relatives, it is with the deepest concern we have to state that the malady under which his Majesty labors is of an alarming description. It is from authority we speak." The libel then stated several facts relating to the king's illness, and concluded by alleging that his disorder was of an hereditary description. At the trial before Abbott, C. J., at the London sittings after last term, the publication of the libel was proved in the usual manner, and it was admitted by the counsel for the defendants, that the libel imported that the king labored under insanity, and that assertion was untrue; but it was urged to the jury that the defendants believed the fact to be true, and that they were warranted in so doing by rumors which had been very prevalent on the subject. The Lord Chief Justice, in his address to the jury, after stating the import of the publication, proceeded as follows: "To assert falsely of his Majesty, or of any other person, that he labors under the affliction of mental derangement, is a criminal act. It is an offence of a more

aggravated nature to make such an assertion concerning his Majesty than concerning a subject, by reason of the greater mischief that may thence arise.

"It is distinctly admitted by the counsel for the defendants, that the statement in the libel was false in fact, although they assert that rumors to the same effect had been previously circulated in other newspapers. Here the writer of this article does not seem to found himself upon existing rumors, but purports to speak from authority; and inasmuch as it is now admitted that the fact did not exist, there could be no authority for the statement. In my opinion the publication is a libel calculated to vilify and scandalize his Majesty, and to bring him into contempt among his subjects. But you have a right to exercise your own judgment upon the publication, and I invite you so to do." After the jury had retired about two hours they returned into court, and the foreman said that the jury wished to have the opinion of the Lord Chief Justice, whether it was or was not necessary that there should be a malicious intention to constitute a libel. To this question the Lord Chief Justice returned the following answer: "The man who publishes slanderous matter, in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to show the contrary. There may indeed be innocent publications of that which, in its own nature, is injurious to another, as, for instance the delivery of a book containing libellous matter to a magistrate; but the general rule is, that a person must be taken to have intended to do that which his act is calculated to effect." The jury again retired for about three hours, and then returned a verdict of guilty, but recommended the defendants to mercy.

Bayley, J. It appears to me that this case was properly presented to the consideration of the jury in the first instance; and that the answer given by my Lord Chief Justice to the question put to him by the jury was perfectly correct. Assuming it to be a question of fact whether the jury were to infer malice or not, the evidence upon that point was all one way, and that being so, it was the duty of the jury to act upon that evidence and find the defendants guilty. It is impossible to form an accurate judgment of the direction to the jury, without adverting to the terms of the libel itself. It contains not merely an assertion of a fact which a party may suppose to be true, and with respect to which he assumes to have had only ordinary means of knowledge, but it is such an assertion, that if it were a *bona fide* assertion, the means of proving it to be so must be within the writer's own. He does not merely say that such a fact exists, but he assumes

to speak from authority. It is conceded, that to state falsely of his Majesty that which is stated in this publication is a libel. If it be not so, the objection will be upon the record, and may be taken advantage of either upon writ of error or by a motion in arrest of judgment. But, as at present advised, I am of opinion that falsely making that assertion was evidence that the party made it maliciously. A distinction has been made between an untrue and a false assertion, and it has been argued that if a party assert a particular fact, believing that the fact exists when it does not, although that be an untrue assertion, yet there is no criminality in it, but that if he assert that which he knows to be untrue, that is a criminal untruth or a falsehood. Assuming that that is a well-founded distinction, I think that if a party knowing a fact not to be true, or not having the means of knowing whether it be true or not, takes upon himself to assert that it is so, then he makes a false assertion, or is guilty of a criminal untruth, if it turns out that his assertion is unfounded. In the one case the criminality consists in asserting that which he knows not to be true, in the other he is making an assertion unwarrantably, when he does not know whether it be true or not. There are authorities to show that if a man will take upon himself to swear to a thing when he does not know whether it be true or false, he is liable to be indicted for perjury, if his testimony prove to be false. Now, is the assertion in this case to be considered false or not, in the latter sense of the word? A party making such an assertion may or may not have the means of knowing the state of his Majesty's health, but here the writer takes upon himself to state that he has authority for stating such and such facts. Now if he had such authority, he had the means of proving it to the jury, and of showing that the character of untruth belongs to it only, and not that of falsehood or criminal untruth; but inasmuch as he has not shown that he had any authority for stating the fact, it must be taken that he had none, and that it was a false assertion, which disposes of one ground upon which this motion was made. Then the other question arises, whether the defendant is to be considered as having published the libel with a malicious intention. Assuming malice to be necessary in all cases to constitute a libel, I take it to be established by many authorities, to some of which I have referred in the course of the argument, that a party must be considered, in point of law, to intend that which is a necessary or natural consequence of that which he does. If I utter defamatory language of a particular person, the presumption is that I mean to do him a mischief. My assertion of a fact defamatory with regard to him, will materially prejudice him in the eyes of all the persons who hear or read what is said of him. The King *v.* Creevey, 1 M. & S. 273, is a strong authority to show that the answer given by

the Lord Chief Justice to the question put by the jury was perfectly correct. That was an indictment against the defendant for publishing a libel of one Kirkpatrick, an inspector of taxes. The libel purported to be an account of a speech delivered by the defendant in the House of Commons, but it was published by him as a correct report of such speech. It was objected at the trial, that there was not any proof of malice, so as to make the publication libellous. The case was tried before Mr. Justice Le Blanc, a man of great talent, accuracy, and firmness; and he was of the opinion that it was not necessary to prove malice, but that it might be inferred from the publication itself, and he told the jury that they were to look both to the matter and the manner of the publication, in order to decide whether it was libellous or not. The defendant having been found guilty, a motion was made for a new trial. The rule was refused, and Lord Ellenborough says, "The only question is whether the occasion of the publication rebuts the inference of malice arising from it," and Le Blanc, Justice, stated "that he had told the jury to consider whether the publication tended to defame the prosecutor, giving his opinion that it did, but still leaving the question to them; and he further stated to them that where the publication is defamatory the law infers malice, unless anything can be drawn from the circumstances of the publication to rebut that inference." I cannot distinguish that case from the present. Here, the publication was of a matter which, if false, it is now conceded was libellous. Now this decision says that malice ought to be inferred from the publication of defamatory matter, unless some excuse for the publication be shown. The onus, therefore, of negativing malice is properly cast upon the defendant, for where the natural inference from the publication is that it is malicious, the party seeking to exempt himself from such natural inference, must do it by showing something te rebut the inference, otherwise arising from his act. Here the defendant might have adduced evidence for that purpose; he might have shown what his authority was. In the absence of any such evidence I think the intention was naturally and properly to be drawn from the libel itself, and, consequently, that there is no foundation whatever for disturbing the verdict.

Holroyd, J. I am of the same opinion. This is a charge for a publication of a libellous nature, and of a description not only injurious to the individual to whom it relates, but mischievous to the public, inasmuch as it was calculated to excite great alarm in the minds of the people as to the state of his Majesty's health. Now if a thing in itself mischievous to the public be wrongfully done, that is an indictable offence. It is not necessary to aver in such an indictment any direct malice, because the doing of such an act without any excuse

is indictable. In some cases, as in that of murder, malice is the very gist of the offence, but in larceny, malice is not an ingredient. In this case, the act done was mischievous to the public. It appears, therefore, that it was not absolutely essential to aver malice in this indictment, or to prove it at the trial; but it is unnecessary to discuss that point, because I think that, upon the rules and principles of the common law, malice was to be inferred from the evidence laid before the jury, and the jury were bound, in the discharge of their duty, to act upon those rules and principles, and to apply the law to the facts before them. The publication in this case assumes the knowledge of the fact which it alleges. It states that the writer had it from authority, and whatever may be the import of that word, if there was any authority to justify or excuse the publication, it ought to have been shown by the defendant. For if the matter published was in itself mischievous to the public the very act of publishing is *prima facie* evidence to show that it was done *malo animo;* for when a publication having such an injurious tendency is proved, it is intended to have been done with a malicious intention, because the principle of law is, that a party must always be taken to intend those things and those effects which naturally grow out of the act done. If, therefore, the effects naturally flowing from the act of publishing the libellous matter in this case were mischievous to the public, it follows, that the judge was bound to tell the jury that malice was, by law, to be inferred; and that having been proved which, according to the principles of law, made the inference of malice necessary, the onus of rebutting that inference was cast upon the defendant. It is said, however, that my Lord Chief Justice was bound to answer the abstract question put by the jury, but I am of opinion that a judge is not bound to answer any question put by the jury, except so far as it is material to the matter which the jury have to decide; and in this case if the jury were satisfied, from the answer given, that it was to be presumed that the defendant intended the consequences which would naturally follow from his act, they must at the same time have been satisfied there was sufficient proof of malice, and therefore there can be no ground for disturbing the verdict.

BEST, J. The paper set forth in this information is most correctly called by it a false, scandalous, and malicious libel. We have been told by the defendant's counsel, that malice is the gist of this prosecution. I accede to this, but we must settle what is meant by the term malice. The legal import of this differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred or ill-will to an individual, but means any wicked or mischievous intention of mind. Thus, in the crime of murder, which is

always stated in the indictment to be committed with malice aforethought, it is neither necessary, in support of such an indictment, to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable or excusable cause. Malice, in the law relative to libels, means legal malice. The only question which the jury had to decide was, whether a paper which falsely represented that the sovereign of the country was insane and, so, incapable of discharging the duties of his office, was a mischievous paper; no men, whose minds were not disordered, could hesitate how to decide such a question. It is not possible to imagine any publication more calculated to produce irritation and disorder throughout the country, and the publishers must be taken, according to legal reasons, to have intended to produce those consequences which it was calculated to produce. The defendants were not charged with a libel published from motives of personal hatred to the king, but with a false report of the state of his Majesty's mind, made with a view to disturb the peace of the country. It was admitted at the trial that the libel was false, but it was at the same time insisted, that the defendants, at the time when they published it, did not know it was false. They say they publish from authority, and thereby undertake to be responsible for its truth. But whether a publication be true or false is not the subject of inquiry in the trial of an information for a libel, but whether it be a mischievous or innocent paper. In the position in which this case now stands, it is not necessary to decide whether the defendants would have been justified had the statements been true. But it must not be taken for granted that if such a dreadful affliction had happened to the country as the insanity of the king, the editor of a newspaper would be justified in publishing an account of it at any time, and in any manner that he thought proper. It is fit the time and mode of such a communication should be determined on by those who are best able to provide against the effects of the agitation of public feeling which it is likely to produce. A reasonable time should be left to the constituted authorities to give the nation such afflicting intelligence. During that time decency requires that all persons should be silent. If such a communication should be improperly delayed, the fair liberty of the press would allow any person to call the attention of the nation to the circumstance. But such a communication, rashly made, although true, might raise an inference of mischievous intention, for truth may be published maliciously.

ABBOT, C. J. My learned brothers having delivered their opinion, that nothing which fell from me, in my address to the jury, furnishes

sufficient ground for granting a new trial, it is perhaps unnecessary for me to say anything; I cannot, however, forbear making one or two observations. If it be true that a malicious intention be necessary to render amenable to the law a person who publishes defamatory matter, — I say that unless that malicious intent may be inferred from the publication of the slander itself, in a case where no evidence is given to rebut that inference, the reputation of all his Majesty's subjects, high or low, would be left without that protection which the law ought to extend to them. I will say further, with regard to the particular expression contained in this publication, that if any writer thinks proper to say that he speaks from authority when he informs his readers of a particular fact, and it shall turn out that the fact so asserted is untrue, I am of opinion that he who makes the assertion in such a form may be justly said to make a false assertion. I am not a sufficient casuist to say that to call it an untrue assertion would be a more proper mode of expression.

Rule refused.

HOARE *v.* SILVERLOCK,

12 Q. B. 625 [1848].

Case. The third count stated that defendant, further contriving, etc., afterwards, to wit, etc. (25th July, 1846), in a public newspaper called The Nautical Standard and Steam Navigation Gazette, falsely and maliciously composed and published, and caused and procured to be published, of and concerning plaintiff, and of and concerning her said application to the said Society, another false, scandalous, malicious and defamatory libel, containing amongst other things, the false, etc., matter following, of and concerning the plaintiff, and of and concerning her said application to the said Society, viz.: "The Royal Naval Benevolent Society. We were sorry to perceive, by a report of last Monday's proceedings at a meeting of the above Society, that the case of Miss Hoare (meaning the plaintiff), which we imagined had been entirely dismissed by the unanimous decision of a large body of officers of high rank and distinguished position in the service at the last quarterly court, had been reopened, and that too by an officer distinguished no less for his illustrious services against the enemy than his noble descent. The gallant Rear Admiral, the Earl of Cadogan, has happily been a stranger to those scenes which have occurred at the former meetings of this society when the case of the above misguided woman has been brought forward. But, if he has escaped the exhibition of such conduct on the part of one or two officers who would by the dis-

play be certainly very much lowered in his estimation, his lordship has unfortunately also missed the hearing of an overwhelming mass of evidence which is a complete justification for the Society's decision with respect to the claims of Miss Hoare, to say nothing of the recantation of some who were her warmest friends, and who, in giving up their advocacy of her claims, stated that they had realized the fable of The Frozen Snake." "Let the noble Earl go to the Society's offices and examine carefully the documents, and make himself acquainted with the whole of the proceedings of the secretary and the Society in this matter, and he must come to the conclusion that the case of Miss Hoare is a most forlorn hope, and that, unfortunately, many much more worthy objects of the Society's benevolence are excluded from participation in it by the limited state of its funds."

The fourth count charged, with the same averments as were made in the third, publication in the above-mentioned newspaper by defendant on August 8th, 1846, of a libel containing the following passages: "Sir, having attended the meetings of the Royal Naval Benevolent Society, and witnessed the painful and strong disputes in the case of Miss Hoare, I am led somewhat reluctantly to address these few observations to you in justice to our worthy secretary, and on behalf of our charitable institution, which has been upon recent events the scene of much discord and so very disreputable to the Society. The importunities of Miss Hoare and her supporters, although they have been upon every occasion outvoted by a very large majority of the members of the institution, have nevertheless operated in no small degree to suppress the contributions of several benevolent persons who, opposed to strife, would have added their pecuniary assistance to the naval widow and orphan but for our calamitous disunion. For one, I am determined to withdraw my subscription should any of our funds be granted to Miss Hoare: but I hope and trust the good sense of the members at our next meeting will, as heretofore, prevail, and reject forever the unworthy claims of Miss Hoare." "Bold and strong measures ought to be adopted to prevent the reopening of Miss Hoare's case which, in other words, means the renewal of an unjustifiable and apparently vindictive attack on the secretary. Who is this woman, that she is to engross almost the whole of the time of the Society? She is not entitled, as the descendant of a subscriber or in her own right, to relief; and it is avowed by her friends that she squandered away the money which she did obtain from the benevolent, in printing circulars abusive of Commander Dickson. Really, it is time that all this twaddle about humanity, and this display of knight-errantry in defence of a slanderous and forlorn damsel, should be laid aside."

"The charge must be made against Commander Dickson, and, if it

be not made, then let the case of Miss Hoare be buried in oblivion, and let not the discord which it has caused longer prevent the benevolent from subscribing for the widow and orphan," etc.

There was a fifth count, for another libel.

On the trial, before Coleridge, J., at the sittings in Middlesex after Michaelmas term, 1847, a verdict was found for the plaintiff, and damages assessed generally, on the last three counts.

Lord Denman, C. J. There is no ground for our interference. The third count is certainly good. We are not called upon here to take judicial notice that the term "Frozen Snake" had or had not the meaning ascribed to it by the plaintiff, but to say, after verdict, whether or not a jury were certainly wrong in assuming that those words had the particular meaning. They are words well understood; there is no doubt that they are commonly known in a libellous sense; it must, here, have been left to the jury to say whether they were used in that sense or not; and we must take it that they considered them as so applied. None of the cases sustain the objections here made. In Robinson *v.* Jermyn[1] the supposed libel alleged only that the proprietors of a subscription-room did not think the plaintiff a fit person for their company, and therefore excluded him from their room, which might be rather a compliment than a reproach. The "Friday" alluded to in Forbes *v.* King[2] was a very respectable person; black men have not been declared to be criminal by any act of parliament. The fourth count is certainly injurious to the plaintiff; for it describes her as an applicant to the Society for charity, but unfit to receive it, because she employs the money she obtains from the benevolent in circulating abuse of the secretary.

Patteson, J. The principal question before us has been whether these words, — "to say nothing of the recantation of some who were her warmest friends, and who in giving up their advocacy of her claims, stated that they realized the fable of the Frozen Snake —" could import, on the face of them, anything slanderous. If they could not, I am not prepared to say that judgment should not be given for the defendant on the third count, as upon demurrer. But, if they are capable of a libellous sense, it may be material that the jury has found that they were used in that sense. Then as to the question whether an innuendo was necessary, I think it was not. Any ordinary person would be able to say what the allusion was; and the jury have found it. As to the fourth count; the expression "unworthy claims" alone, is strong; and then it is added "Who is this woman, that she is to engross almost the whole of the time of the Society? She is not en-

[1] 1 Price, 11. [2] 1 Dowl. P. C. 672.

titled, as the descendant of a subscriber or in her own right, to relief: and it is avowed by her friends that she squandered away the money which she did obtain from the benevolent, in printing circulars abusive of Commander Dickson." These words manifestly infer misconduct, and tend to bring the plaintiff into contempt, and set the readers against her as a person who has misconducted herself towards this Society.

COLERIDGE, J. As to the necessity of an innuendo, the jury and court in such a case as this are in an odd predicament, if they alone of all persons are not to understand the allusion complained of. Suppose the libel had said the plaintiff acted like a Judas: must the history of Judas have been given, and referred to by innuendo? We ought to attribute to a court and jury an acquaintance with ordinary terms and allusions, whether historical, or figurative or parabolical. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative and has obtained a signification almost literal, we must understand it as it is used. Half of our language is founded upon allegorical allusion: "vinegar" is talked of in describing a bad temper; even the word "sour" is figurative. We must understand such terms according to the sense which has become familiar.

EARLE, J. In this case the jury had decided on the sense of the words mentioned in the third count; and we cannot arrest the judgment unless we see, on reading the whole passage complained of, that there could be no ground for the construction they have adopted. Nothing is easier than to bring persons into contempt by allusion to names well known in history, or by mention of animals to which certain ideas are attached; and I may take judicial notice that the words "Frozen Snake" have an application very generally known indeed, which application is likely to bring into contempt a person against whom it is directed. I also think the fourth count libellous by the tendency it has to lower the plaintiff's character.

Rule discharged.

COX *v.* LEE,

L. R. 4 Ex. 284 [1869].

THE cause was tried before Pigott, B., at the Leicester spring assizes, 1869. The publication by the defendant of the libels was proved,[1] and it appeared that the facts with respect to the alleged loan were as follows: The plaintiff conducted the Advertiser in partnership from 1850 to 1857; in the latter year he bought out his partner, and on that

[1] The gist of the libellous charges was ingratitude.

occasion (as he swore) an offer of assistance was made to him by Mr. Frewen, but (as Mr. Frewen swore) a request for assistance was made by him to Mr. Frewen; no money, however, was then advanced, but in 1863 the plaintiff requiring money to pay off a sum which he had borrowed to enable him to work the paper, did obtain a loan of £300 from Mr. Frewen, which was to be paid off by instalments of £100 per annum, with 5 per cent interest; in 1865, however, the plaintiff having privately remonstrated with Mr. Frewen on his political conduct, and urged him to retire from the then impending election contest, Mr. Frewen required the whole of the remaining debt to be paid off at once, and this was accordingly done.

A verdict was found for the plaintiff, damages £20. In Easter Term a rule was obtained to arrest the judgment, on the ground that none of the counts in the declaration disclosed any cause of action; or for a new trial on the ground that the learned judge ought to have directed the jury to find for the defendant on both issues, and also on the ground that the verdict was against the weight of the evidence, and that the damages were excessive.

KELLEY, C. B. The verdict being for general damages not apportioned to the several counts, if any one bad count is joined with the others the verdict cannot stand. We are, therefore, called on to determine, not whether a libel was in fact published, but whether what the plaintiff has published has been so stated that it was competent to the jury to find a verdict and give damages upon that statement. The allegation in the counts most questioned is, that when the plaintiff wanted to purchase a newspaper he had no money to buy it with, and made one or more urgent applications to Mr. Frewen for a loan, which had since been honorably repaid. It is impossible to consider the question raised on this statement fairly without putting one's self in the position of the plaintiff, and seeing whether it would not be painful to his feelings to have such statements made at a public meeting, in the county where he resides and publishes his newspaper, by a gentleman of considerable standing and position in that county. Without reference to the bearing of that statement on the charge of ingratitude, and the question whether it would or would not lead those who heard it to the inference that a person so acting as was described was guilty of ingratitude, to say of a man, prosperous and in independent circumstances, that when he wanted to purchase the property he now owns he had not money to pay for it, and made urgent application for a loan to another person, does in itself convey a reflection on the person thus spoken of, not only likely to be painful to his feelings, but also likely to impair his credit and reputation in the country. A charge pointing to anything like inability in respect of pecuniary resources would, to

persons reading such a statement in a public newspaper, tend to injure his position in the world. [After referring to the question of damages, which he held not excessive, the learned judge proceeded]: We are further called upon, on the facts actually proved, to determine, not only whether the publication could or could not be libellous, but to say that it was of such a nature that the question ought not to have been left to the jury. But it is only when the judge is satisfied that the publication cannot be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance. Here, on the contrary, I am of opinion that the learned judge was fully justified in leaving the question to them, and that their finding is according to the evidence.

Bramwell, B. I also think this rule must be discharged. The libels complained of charge the plaintiff with ingratitude; for though facts are added, yet the obvious meaning of the statements is to make this accusation. It is clear that if ingratitude is charged generally, without any reason being given, it is libellous; and the validity of the first count is not questioned. But with respect to the other two it is said that they disclose no cause of action, because Mr. Frewen shows what it is that he calls ingratitude, and thereby shows that it is not such in fact. But though it is true that he states some reasons which induce him to come to the conclusion that the plaintiff was ungrateful, there still remains the charge of ingratitude, and any one hearing it might well say: "The facts stated no doubt existed, but inasmuch as they do not show any ingratitude, that charge must be made because of something else not mentioned."

But, further, I think the libels not only contain a charge of ingratitude, but also show its existence, supposing the facts truly stated. For, though it is easy to say that it is the duty of a patriot, if he sees an unfit man aiming at the possession of a public post, to say he is unfit, this is, like gratitude itself, a duty of imperfect obligation, and not such as would necessarily relieve him in its performance from the charge of ingratitude. Suppose that, having applied with great urgency to Mr. Frewen to lend him money, Mr. Frewen had done so, and then, without any further circumstances, the plaintiff had withdrawn his support from Mr. Frewen, and said that he was not a proper person to stand for the county, would it not have been ungrateful? I think it would. But supposing it was his duty to point out Mr. Frewen's unfitness, it might have been done in another way than that adopted, which casts ridicule upon his candidature and charges him with indiscretion. I think that it would have been ungrateful in the plaintiff to write thus of one to whom he was under the obligation I have supposed; the defendant's argument therefore fails, even on this ground,

for the libel stated in the declaration not only charges ingratitude, but shows that it exists.

Then it is argued that in that case the libel is at any rate justified, because the statement it makes is true. But this is not so; and, on the contrary, if the true facts had been stated, they would have shown that there was no ingratitude at all, for it appears that, on the plaintiff telling Mr. Frewen that he would no longer support him, Mr. Frewen required the repayment of the money, and thereupon the money was, in fact, repaid. Now, I think that cancelled the former obligation, and left the plaintiff at liberty to write as he did. If these facts had been stated, the case would have gone a long way to raise the point insisted on by Mr. Bulwer, for then, at the same time with the charge of ingratitude it would have been shown that there was nothing ungrateful in the plaintiff's conduct; the added circumstances would have qualified the charge of ingratitude, not in the sense of making it justifiable, but in the sense of diminishing the probability of its injurious effect.

Therefore the defendant's case fails: first, on the ground that a charge of a moral offence is made, and assuming that the circumstances stated in snpport of it do not warrant the opinion founded on them, it does not cease to be a libel, for it raises a doubt whether there are not some other facts which would justify the charge; and, secondly, because if no further facts existed than were stated, a case of ingratitude was shown; and, though the facts might be true, so far as they were stated, other facts were not stated, which existed and which would have shown that the plaintiff was not open to the charge of ingratitude.

I may say that these observations are directed partly to that portion of the rule which seeks to arrest the judgment, and partly to that portion which asks for a new trial.

CHANNELL, B. I am of the same opinion. A judge would do wrong if, in an action for libel, he told the jury distinctly that the plaintiff had a cause of action, or if he told them distinctly that the plaintiff had not a cause of action. In Parmiter *v.* Coupland, 6 M. & W. 105, Parke, B., after referring to Mr. Fox's Act,[1] by which, as he observes, indictments for libel were put upon the same footing as other criminal charges, says,[2] "It has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first, to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction; and that, whether the libel is the subject of a crim-

[1] 32 Geo. III., c. 60, § 2.

[2] 6 M. & W. at p. 107.

inal prosecution or civil action." My Brother Pigott has therefore given the proper direction to the jury; and certainly when, at a public meeting, words are used which are repeated in a public newspaper, and which charge the defendant with ingratitude, that sufficiently raises a question for the jury, whether they were not made use of under such circumstances, and in such a manner, as to make them libellous. There can be no doubt that the charge is in itself as opprobrious as any that can be made. Therefore, although you couple it with other matters, which tend to explain the charge, it is still a question for the jury whether the language was made use of in such a mode and under such circumstances as to justify a verdict for the plaintiff.

PIGOTT, B. At the trial I exactly followed the rule laid down by Parke, B., in the passage cited by my Brother Channell defining to the jury what in law amounted to a libel, and leaving the question of libel or no libel to them. My Brother Bramwell has clearly pointed out that the charge was made, not in such a manner as to disprove it, but rather to add to it force and point; and much must always depend upon the attendant circumstances. As to the charge of ingratitude being in itself calculated to bring into contempt and disrepute, no one can deny it who considers in what light it is regarded by poets and moralists, who are the mirrors and exponents of the universal feelings and judgment of mankind. I think, if I committed any error, it was an error rather in favor of the defendant. *Rule discharged.*

COMMONWEALTH *v.* CLAP,

4 MASS. 163 [1808].

THE defendant was indicted for making and publishing the following malicious libel against one Caleb Hayward, an auctioneer, and posting it up in several public places in State Street, in Boston, viz., "Caleb Hayward is a liar, a scoundrel, a cheat, and a swindler. Don't pull this down."

Upon the trial at the last November term before Parker, J., the counsel for the defendant insisted upon their right to prove the truth of the matters charged in the libel, and stated that if permitted, they could prove that, in a course of dealing between the defendant and Hayward, the latter had defrauded the former; and particularly that, upon a reference of certain disputes between them, Hayward had, by means of misrepresentations and suppressing evidence, recovered a much larger sum against the defendant than he, Hayward, knew to be due; and further, that in his dealings with other people, Hayward had

in many instances acted unfairly. The motion was overruled by the judge, and the defendant, being found guilty, moved for a new trial, because evidence to the foregoing effect was rejected.

This motion came on now to be argued by *Bidwell*, Attorney-General, and *Davis*, Solicitor-General for the Commonwealth, and *Otis* and *Selfridge* for the defendant.

The opinion of the Court was afterwards delivered by

PARSONS, C. J. The defendant has been convicted by the verdict of a jury of publishing a libel. On the trial, he moved to give in evidence, in his defence, that the contents of the publication were true. This evidence the judge rejected, and for that reason, the defendant moves for a new trial. It is necessary to consider what publication is libellous, and the reason why a libellous publication is an offence against the Commonwealth.

A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule.

The cause why libellous publications are offences against the State, is their direct tendency to a breach of the public peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would not be easy to restrain, were offences of this kind not severely punished. And every day's experience will justify the law in attributing to libels that tendency which renders the publication of them an offence against the State. The essence of the offence consists in the malice of the publication, or the intent to defame the reputation of another. In the definition of a libel, as an offence against law, it is not considered whether the publication be true or false; because a man may maliciously publish the truth against another, with the intent to defame his character, and if the publication be true, the tendency of it to inflame the passions, and to excite revenge, is not diminished, but may sometimes be strengthened.

The inference is, therefore, very clear, that the defendant cannot justify himself for publishing a libel, merely by proving the truth of the publication, and that the direction of the judge was right.

If the law admitted the truth of the words in this case to be a justification, the effect would be a greater injury to the party libelled. He is not a party to the prosecution, nor is he put on his defence; and the evidence at the trial might more cruelly defame his character than the original libel. Although the truth of the words is no justification in a criminal prosecution for a libel, yet the defendant may repel the charge, by proving that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man. And there may be

cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame.

Upon this principle a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel.

And when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for office. And publications of the truth on this subject, with an honest intention of informing the people, are not a libel. For it would be unreasonable to conclude that the publication of truths which it is the interest of the people to know, should be an offence against their laws.

And every man holding a public elective office may be considered as within this principle; for as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a re-election, if he does not disclaim it. For every good man would wish the approbation of his constituents for meritorious conduct. For the same reason, the publication of falsehood and calumny against public officers or candidates for public offices, is an offence most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens to their great injury, and it may be to the loss of their liberties.

But the publication of a libel maliciously and with intent to defame, whether it be true or not, is clearly an offence against law, on sound principles, which must be adhered to, so long as the restraint of all tendencies to the breach of the public peace, and to private animosity and revenge is salutary to the commonwealth.

The defendant took nothing by his motion, and was afterwards sentenced to two months' imprisonment, with costs.

REGINA *v.* BROOKE,

7 Cox C. C. 251 [1856].

The defendant was indicted for unlawfully publishing a false, scandalous, and malicious libel of and concerning Edward Mostyn Baron Mostyn. The indictment alleged that it was against the peace of our Lady the Queen; but there was no statement of its tendency to provoke a breach of the peace on the part of the prosecutor.

The libel was contained in a letter addressed to the prosecutor, which letter was received by him, but there was no evidence of publication to any other person.

THE RECORDER. I am of opinion that it is not necessary to allege in the indictment that the publication of the libel had a tendency to provoke a breach of the peace. It is not suggested that the indictment is bad on the face of it, but merely that it is not supported by the evidence adduced. But the case cited (R. *v.* Wegener, 2 Stark, 245) by no means bears out that proposition. There the first count alleged that the libel was sent to the prosecutor, and that it was intended to injure him in his character of a solicitor. The second count alleged a publication generally, but with the same intent and tendency; and the court held that the averments were not supported by mere evidence of a letter sent to the prosecutor and received by him. That case rather strengthens the view I am disposed to take here, and I therefore decide that there is evidence of publication to go to the jury.

SHEFFILL *v.* VAN DEUSEN,

13 GRAY, 304 [1859].

BIGELOW, J. Proof of the publication of the defamatory words alleged in the declaration was essential to the maintenance of this action. Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men and not in a party's self-estimation which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff containing defamatory matter was held insufficient proof of publication; although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace. So, too, it must be shown that the words were spoken in the presence of some one who understood them. If spoken in a foreign language which no one present understood, no action will lie therefor. Edwards *v.* Wooton, 12 Co. 35; Hicke's case, Pop. 139 and Hob. 215; Wheeler and Appleton's Case, Godb. 340; Phillips *v.* Jansen, 2 Esp. 624; Lyle *v.* Clason, 1 Caines, 581; Hammond N. P. 287. It is quite immaterial in the present case that the words were spoken in a public place. The real question for the jury was, were they so spoken as to have been heard by third persons? *Exceptions sustained.*

CHAPTER XLV.

PERJURY.

HENDERSON TUTTLE, PLAINTIFF IN ERROR, *v.* THE PEOPLE, DEFENDANTS IN ERROR.

36 N. Y. 431 [1867].

WRIT OF ERROR to the Supreme Court. The plaintiff in error was tried and convicted at the Jefferson Sessions on an indictment for perjury, in proving as subscribing witness the execution of a deed to his wife from one Stephen Gifford.

It appeared on the trial that Bennett Rice, the father-in-law of the prisoner, died intestate in 1857, and that his wife, and her sister, Mrs. Otis S. Gifford, succeeded to portions of his property, embracing lands in the town of Watertown. In January, 1859, Mrs. Tuttle and Mrs. Gifford released to Stephen Gifford, for a nominal consideration, their respective interests in the real and personal estate of their deceased father.

On the 30th of April the grantee and his son, Otis S. Gifford, were at the office of John Clarke, a lawyer at Watertown, when Mr. Clarke, who had been present at the execution of the release, suggested a reconveyance, and drew up a deed to Mrs. Tuttle with that view. Stephen Gifford signed it, Mr. Clarke subscribed it, as attesting witness, and the deed was handed to Otis S. Gifford, who was present at its execution, to be delivered to his sister-in-law. He subsequently gave it to Mrs. Tuttle, when she was at his house. The prisoner afterward got it away from his wife, and she could not get it back. Her brother-in-law, in July, 1860, saw him and requested him to return it to her. Tuttle replied that the deed was good for nothing, blamed Otis for taking such a deed, and said that he never would have taken it if he had been there. He retained the conveyance as late as the spring of 1862, when he showed it to his brother. His wife, however, afterward regained possession of it, and, in the fall of 1863, she delivered it to Mr. Moore, of Watertown, who was her attorney in the prosecution of three civil actions against her husband. It remained in his possession, tied up in the bundle of papers relating to those suits, until shortly before the prisoner presented it for record, when it was surreptitiously taken from his office. He was unable to trace it, until on inquiry he found it with the county clerk. In the meantime it had been taken by

the prisoner to the office of Jesse T. Reynolds, his attorney in the defence of these suits, who was also a justice of the peace.

It appeared on the trial, by the testimony of the prisoner's brother, who was one of the witnesses in his behalf, that in the spring of 1862, and before the difficulties between Tuttle and his wife resulted in a separation, the brother took a mortgage from her, covering property she inherited from her father, to secure to him the payment of $900. The witness expressed the opinion that the loan was made to her, but he admitted that, though she was present, and was the party executing the mortgage, he paid the money, in fact, to her husband, and not to her. The brother borrowed the money from the bank, on his own note, indorsed by the prisoner and his father, and left the mortgage as collateral security for the payment of the note. He afterward negotiated a transfer of the mortgage to a Mr. Paddock.

When the abstracted deed was taken by the prisoner to Reynolds in the spring of 1864, he explained to him, as Reynolds admits in his testimony, that the mortgage taken from his wife by his brother had been sold to Paddock, who made it a condition that the prisoner should give a collateral mortgage; that he gave such a mortgage; and that the reconveyance by Gifford to her needed to be on record to perfect her title to the land she had mortgaged.

The matter seems to have remained some time under advisement; as Reynolds testifies that the deed was in his hands at least six weeks or two months before it was acknowledged. At some time during this period and shortly before the day on which the prisoner proved its execution by his own oath, Reynolds drew a certificate at the foot of the deed, reciting proof of its execution by Mr. Clarke, the subscribing witness, and went to him to take such proof. Mr. Clarke at once assented; but recalling, on second thought, the difficulty between Tuttle and his wife, he asked where the paper came from. Reynolds replied, from Tuttle. Mr. Clarke said, under those circumstances he could not consent; but if it came from Mrs. Tuttle, he would.

Reynolds afterward reported the result of this interview to Tuttle. He says the prisoner then asked him if he could not acknowledge it, and he states his reply as follows: "I told him if he was present and saw it signed and acknowledged, he might acknowledge it in place of Clarke. I erased Mr. Clarke's name in the body of the certificate, and put in his, and he thereupon sat down and wrote his name under Mr. Clarke's name. I think I said to him that if he saw the deed signed, sealed and acknowledged and delivered, he could then put his name to it and acknowledge it in place of Mr. Clarke." On being asked why he did not take the proof himself, the witness answered: "For the reason that Mr. Clarke had said he thought there was something wrong about

the defendant's having the deed; and I thought if there was anything wrong I might be implicated." He testifies that the partial erasure of Mr. Clarke's signature as subscribing witness, which afterward appeared on the paper, was not then made, but his name stood plain and full; and that the prisoner took the paper and did not return it. The deputy clerk swears that the prisoner delivered it to him the same day; and Mr. Clarke testifies that he found it in that condition at the clerk's office, and that the erasure was not made by him, nor was it there when Reynolds brought it to him to be proved.

After leaving the office of his attorney, the prisoner went before a magistrate and testified to the following specific facts: "That he resided in Watertown; that he knew Stephen Gifford, the individual described in and who executed the conveyance; that he was present and saw Gifford sign, seal, and deliver it as and for his act and deed, and that Gifford then acknowledged its execution, whereupon he (Tuttle) became the subscribing witness thereto."

The fact last stated was proved to be false by the witnesses on both sides. There was evidence which would fully justify the jury in finding that the prisoner was not present when the deed was executed. The grantor, the lawyer who proposed its execution and drew the instrument, and the party to whom it was delivered, were all sworn. Each testified that the other two were present; and though two of them could not swear positively that Tuttle was not there, neither of them remembered that he was; and their testimony tended strongly to confirm the truth of the prisoner's subsequent declaration that he was not present, and the positive oath to that effect of Otis S. Gifford, to whom, as all agree, the deed was delivered for Mrs. Tuttle, though this was before the date of the difficulties between her and her husband. Spence, a witness called by the prisoner, gave testimony tending to show that he saw the accused at Mr. Clarke's office on some occasion of that nature, when old Mr. Gifford was there, and when Otis S. Gifford was not; but his statement was of a vague and unsatisfactory character, and it did not appear that any deed was executed on that occasion.

Various questions were raised as to the sufficiency of the indictment, the validity of the deed, the admissibility of evidence, the materiality of the facts proved by the prisoner's oath, the absence of one of the justices for a few moments from his seat, and the instructions of the court to the jury, which are adverted to in the opinion so far as they are deemed material.

The jury found the prisoner guilty, and the conviction was sustained, at the General Term in the fifth judicial district, the opinion of the court being delivered by Mr. Justice Mullen.

PORTER, J. The deed was not the property of the prisoner. He

was at variance with the grantee, and had an interest in having it recorded. He desired to have a debt collected from her property, for which he had collaterally mortgaged his own. To secure this end, it was not enough that the title with which she had once parted had been afterward reinstated, unless he could establish that fact by legal evidence. Having clandestinely obtained the deed, he encountered, in the refusal of Mr. Clarke, an unexpected impediment in the way of having it proved and recorded. He could not compel the subscribing witness to make the proof, as he did not hold under the grantee. The device to which he resorted, was the only available mode of securing the record evidence he desired. The grantor resided in the same town, but he could not apply to him for an acknowledgment, without the risk of detection and exposure, before the deed surreptitiously taken from the office of Mr. Moore could be recorded and returned. It was not enough, however, that he was ready to personate the character of subscribing witness, which he supposed he could do with safety, under cover of the justice's advice. The statute required an oath of the truth of the facts, essential to satisfy the officer taking the proof, and to justify the clerk in recording the instrument. To attain the desired end, he complied with this condition. The oath was administered in due form and by a competent officer. The facts to which he testified were material to the inquiry, which it was the duty of the magistrate to make; and if his testimony was wilfully and corruptly false, he was guilty of the crime of perjury.

There is no force in the objection, that the deed which he proved was void for uncertainty. That was a matter over which the magistrate had no jurisdiction, and as to which the prisoner gave no testimony. The object of the proceeding was to secure evidence of the execution and contents of the instrument; and if the facts to which he swore were material to that issue, the ultimate failure of his purpose through any inherent defect in the description would not mitigate the turpitude of his crime. But the deed was valid and effectual, as a reconveyance of the property inherited by Mrs. Tuttle from her father. Jackson *v.* DeLancey, 4 Cow. 427.

It is claimed that the indictment is bad, in charging that the oath was administered to the prisoner on "the Holy Scriptures" instead of the "Gospels," the term used in the statute. The Scriptures include the Gospels, and the statute is complied with when the oath is administered either upon the Evangelists, the New Testament, or the Bible, which embraces the whole gospel of revealed religion. It was unnecessary in the indictment to specify the particular mode in which the prisoner was sworn; and the averment that the oath was administered by the magistrate in due form of the law is amply sufficient, even

if the clause in question were to be rejected as surplusage. Dodge *v.* State, 4 Zabriskie, 455; People *v.* Phelps, 5 Wend. 9; People *v.* Warner, id. 271; People *v.* Cook, 4 Seld. 84, 85.

It was also unnecessary to aver in the indictment the antecedent circumstances connected with the title of Mrs. Tuttle to the property embraced in the deed, though it was proper to prove them on the trial, for the purpose of shewing the relations which subsisted between her and the prisoner, and the motives which led to the commission of the crime. It was sufficient to allege the substantial and specific facts constituting the offence, without setting forth the evidence by which the truth of the averments was to be maintained.

There was no error in permitting the witness, Clarke, to testify to his refusal to prove the execution of the deed, when applied to for that purpose by Reynolds. The application was made at the request of the prisoner, and the result was reported to him by the messenger. It was part of the *res gestæ*, and it was material as matter of inducement.

Evidence was properly received, showing that the deed was surreptitiously taken from the office of Mrs. Tuttle's attorney. It had a legitimate bearing on the question of the prisoner's good faith, and reflected light on the motives which governed his subsequent action. Hennequin *v.* Naylor, 24 N. Y. 139; Hendrickson *v.* People, 10 id. 31; People *v.* Larned, 7 id. 452.

The motion to strike out the cross-examination of the prisoner's brother was properly denied. His testimony showed the facts in relation to the two mortgages, and the inducement to the commission of the offence.

The statement of the prisoner to Reynolds, the justice, was admissible for the same reason; and as he sought to shield himself under the advice of this witness, it was the right of the prosecutor to ascertain the state of facts on which that advice was obtained.

The judge was right in refusing to instruct the jury in accordance with the various propositions submitted by the prisoner's counsel. The only one calling for particular observation is the request to charge that "if the jury believe the defendant was present, and saw the deed executed and delivered, then, if he thereafter set his name to it as a witness, and made the proof of acknowledgment, believing he had the right to do so, no conviction can be had." Such an instruction would have been inapplicable to the facts, and could only have tended to mislead the jury as to the law. There was no evidence on the trial that the prisoner was present, and saw the deed executed and delivered. No such fact was proved by the witness Spence. On the occasion to which he refers, Otis S. Gifford, the party to whom the deed in question was delivered, was not with his father; Mr. Clarke, the elder

Gifford, and Spence were the only persons there; and it does not appear that any deed was executed at that time. The evidence for the prosecution might not be sufficiently conclusive to satisfy the jury that the prisoner was absent, when the deed in question was executed and delivered to Otis S. Gifford, but there was no evidence to justify them in finding affirmatively that he was present at such execution and delivery. The judge had no right to submit to them a mere matter of speculative belief, not arising upon the proof. The proposition was also objectionable, as tendering to the jury a false issue on the principal question in the case. A mistaken belief by the prisoner, that he had a right to substitute himself for the subscribing witness at a subsequent period, without the knowledge of the parties, and that he could thus make himself a competent witness to prove the instrument for his own pecuniary benefit, could not justify him in falsely swearing that he became the subscribing witness, in fact, at the time the deed was executed. If he had testified to what he now claims to be the truth, on his examination by the magistrate, and had frankly stated that Mr. Clarke was the subscribing witness, who became such at the time of its execution, and that, four years afterward, without the knowledge or consent of the parties, he erased the name of the subscribing witness, and became such in his place, the proposition of the defendant's counsel would have been more pertinent to the issue.

The judge, however, gave him, in another form, the substantial benefit of the instruction. He charged the jury "that if the defendant made the proof pursuant to the advice of his counsel, believing he might lawfully do so, the element of a corrupt intent would be wanting." He added a very appropriate caution to the jury, against overlooking the essential ingredient of good faith, in determining whether he really entertained that belief. "If you see," said the learned judge, "that there was a motive to induce the defendant to want the deed on record, by reason of Mrs. Tuttle's mortgage to T. F. Tuttle, and of the defendant's desire to have the mortgage foreclosed to relieve the collateral; if the advice was given by Reynolds to fall back upon; if you believe it was arranged between the defendant and Reynolds that Reynolds should so advise for such purpose, then the advice would be of no avail as a defence." The soundness of this as a legal proposition is too clear for argument. So far as it was commentary upon the tendency of the evidence, on a question of fact, which the judge fairly submitted to the jury, it was not the subject of legal exception. People *v.* Vane, 12 Wend. 78; People *v.* White, 14 id. 111; Commissioners of Pilots *v.* Clark, 33 N. Y. 267. It is quite apparent that the hypothesis of bad faith, suggested by the judge, is more in harmony with the proof than that of good faith, suggested by the counsel for

the defence. The possession of the abstracted deed by the prisoner; the delivery of it to his own attorney, with the avowed purpose of putting it on record, to promote his private advantage; the unexplained delay for several weeks before the attempt was finally made; the application, through his attorney, to the subscribing witness, whom both of them recognized as the proper party to make the proof; the omission, when that attempt failed, to ask an acknowledgment by the grantor, who resided in the same town; the suggestion, originating with the defendant, that he should himself become a subscribing witness to the deed, and prove its execution *ex parte* in his own behalf; the guarded and hypothetical form of the opinion expressed by his attorney when that suggestion was made; the apprehension of the latter, after his interview with Mr. Clarke, that he might be implicated in the wrong connected with the possession of the instrument, and the consequent substitution of another officer to take the proof; the partial erasure, without his suggestion or sanction, and after the deed was taken from his office, of the name of the subscribing witness, — all these were circumstances worthy of grave consideration by the jury, in determining the question whether the prisoner, in good faith, entertained the belief which he professed, as an excuse for the falsity of his oath; and we see no reason to doubt that their conclusion was rational and just.

It is due to the attorney to say, that it appears by the proof that he was inexperienced as a magistrate; that he had been withdrawn for some time from professional pursuits by military services during the rebellion; that he gave his assent hastily and without reflection to the suggestion of the prisoner; and that before it was finally acted on he was led to withdraw from further participation in the matter, by the circumstances of suspicion which surrounded it.

DAVIES, C. J., HUNT, WRIGHT, SCRUGHAM, and PARKER, J.J., concurred in the foregoing opinion. GROVER, J., concurred in the result. BOCKES, J., was for reversal. *Judgment affirmed.*

STATE OF IOWA *v.* RAYMOND,

20 IOWA, 582 [1866].

APPEAL from Jackson District Court. The defendant was indicted, tried and convicted and sentenced to two years' imprisonment in the penitentiary, for the crime of perjury.

The offence is charged to have been committed by the defendant, in testifying as a witness in behalf of the State, on the trial of Peter

Martin, before a justice of the peace, upon an information for larceny of corn from the field of one Jason Pangborn. The defendant, having taken exceptions to certain instructions and rulings of the court, prosecutes this appeal.

William E. Leffingwell, for the appellant.

F. E. Bissell, Attorney-General, for the State.

COLE, J. The court gave to the jury very full and elaborate instructions. As a whole, they are quite as favorable to the prisoner as he had any right to ask; and in some particulars the instructions were more favorable than the law, as found in the books, would require.

Peter Martin was on trial for the larceny of corn, at the time the prisoner is alleged to have committed the perjury charged.

On the trial of the prisoner Peter Martin was called as a witness for the State, and contradicted the alleged false matter sworn to by the prisoner upon which the perjury is assigned. The only corroborative evidence to that of Martin was the testimony of two witnesses, that they had together examined that portion of the cornfield where the prisoner had sworn he saw or heard Martin gather corn; that their examination was made the second day after the alleged larceny, and they saw no tracks, or corn missing in that part of the field, although the ground was soft and their tracks very apparent.

And the further testimony of Martin's wife, that she and her husband went to bed before the time at which the prisoner swore he saw Martin get the corn, and that although she slept soundly, she knows her husband did not go out that night, because no one could either go out or come in without her knowing it. The sufficiency of this corroborating evidence as well as the instructions in relation to it constitute one of the main grounds upon which defendant's counsel relies for a reversal.

The court, *inter alia*, instructed the jury, that "to support an indictment for perjury, the State must prove, 1st, the authority to administer the oath; 2d, the occasion of administering it; 3d, the taking of the oath by the defendant; 4th, the substance of the oath; 5th, the materiality of the matter sworn to; 6th, the introductory averments of the indictment; 7th, the falsity of the matter sworn to; 8th, the corrupt intention of the defendant; and unless each and every one of these necessary elements of the crime of perjury is established to your satisfaction, and beyond any reasonable doubt, the defendant cannot be convicted." It might, perhaps, be questionable whether the "reasonable doubt" should not arise upon the whole case instead of any one element or more of the crime; but this of course was not error to the defendant's prejudice, if it was error at all, which is a question we do not decide.

The court also instructed the jury that "the matter testified to

must be established by evidence greater than that of one witness. Two witnesses, or one witness and strong corroborative proof, are required to establish the falsity of the matter alleged to have been sworn to by the defendant on the trial before the justice of the peace; *and the corroborative evidence must be of such a character as to show in some degree the falsity of the matter sworn to by defendant*, or to convince the jury that such matter was false. But it is only in proof of the falsity of what was testified to that more evidence than of a single unsupported witness is required."

The italicized portion of this instruction is that upon which the defendant bases his objection. The old rule was, that two witnesses were required to prove the falsity of the matter upon which the perjury was assigned. This rule, however, has long since been repudiated, and the testimony of one witness and strong corroborative circumstances have been held sufficient. But evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction. Rex *v.* Yates, 1 Car. & Mars. 132.

It must be at least strongly corroborative of the testimony of the accusing witness. Woodbeck *v.* Keller, 6 Cow. 118. And the corroboration must be by independent circumstances, tending to show the same results and not merely that the account is probable. 1 Greenl. on Ev. §§ 257 to 259, and authorities cited in notes; 2 Whart. Am. Cr. Law, §§ 2275 to 2280, and authorities cited in notes; 2 Russ. on Cr. 544, 545.

There is possibly a doubt as to the meaning of the language, objected to, in the instruction. If the court intended by it to instruct the jury that any corroborative evidence which should show in some degree the falsity of the matter sworn to, would be sufficient to authorize them to convict, the instruction was clearly erroneous. But if by it was meant (which is more probable) that the corroborative evidence must show in some degree the falsity of the matter sworn to, as distinguished from evidence corroborating the witness as to other matters stated by him, it was not necessarily erroneous.

That this latter construction is not only the more reasonable, from the language itself, but the one evidently intended by the court and understood by the jury, is apparent from a following instruction, to wit: "The jury will consider the character of the alleged corroborating facts and circumstances in the case, and unless they are such as could not exist consistently with the innocence of the defendant, the defendant must be acquitted."

Upon the instructions as a whole, given by the court, there was not error to the prejudice of the defendant. *Affirmed.*

COMMONWEALTH *v.* THEODORE L. GRANT,

116 Mass. 17 [1874].

Indictment for perjury. The indictment set forth at length that at a session of the Police Court of Charlestown, on March 6, 1873, one Lydia L. Grant was in due form of law tried under the name of Lydia L. Linnell on a complaint charging her with larceny from one Theodore L. Grant, within the jurisdiction of said Police Court; that at the trial aforesaid, said Theodore L. Grant did appear as a witness for the Commonwealth, and then and there was sworn to speak the truth, the whole truth, and nothing but the truth, as such witness; that at and upon said trial of the said Lydia, upon the complaint aforesaid, it then and there became and was a material question and subject of inquiry whether the said Theodore L. Grant was not then, or had not been before then, married to the said Lydia; and whether the said Theodore L. Grant had not before then gone through the marriage ceremony with the said Lydia; and whether the said Theodore L. Grant had not represented himself as the husband of the said Lydia; and whether the said Theodore L. Grant and the said Lydia had not before then lived and cohabited together as man and wife; and whether the said Theodore L. Grant and the said Lydia had not before then gone to a minister together and been married to each other by said minister; and whether the said Theodore L. Grant had not before then entered into an agreement of separation with the said Lydia; that the said Theodore L. Grant being so sworn as aforesaid, in the premises, then and there "as such witness as aforesaid, upon the trial as aforesaid, and whilst it was such material question and subject of inquiry as aforesaid, unlawfully, falsely, knowingly, wilfully, and corruptly did depose, swear and give evidence among other things in substance and to the effect following, that is to say, that the said Theodore L. Grant was not then, nor had ever before then, been married to the said Lydia; that the said Theodore L. Grant had not before then gone through the marriage ceremony with the said Lydia; that the said Theodore L. Grant had never represented himself as the husband of the said Lydia; that the said Theodore L. Grant and the said Lydia had never before then lived and cohabited together as man and wife; that the said Theodore L. Grant and the said Lydia had not before then gone together to a minister and been married to each other by said minister; and that the said Theodore L. Grant had not before then entered into an agreement of separation with the said Lydia. Whereas in truth and in fact the said Theodore

L. Grant, at the time he so deposed and swore as aforesaid, well knew that he was then and for some time before then had been married to the said Lydia; whereas in truth and in fact the said Theodore L. Grant had before then gone through the marriage ceremony with the said Lydia; and whereas in truth and in fact the said Theodore L. Grant had represented himself as the husband of the said Lydia; and whereas in truth and in fact the said Theodore L. Grant and the said Lydia had before then lived and cohabited together as man and wife, and whereas in truth and in fact the said Theodore L. Grant and the said Lydia had before then gone together to a minister and had been married by said minister to each other; and whereas in truth and in fact the said Theodore L. Grant had before then entered into an agreement of separation with the said Lydia, as the said Theodore L. Grant then and there well knew, but the said allegations were so sworn to and given in evidence as aforesaid by the said Theodore L. Grant for the purpose of unlawfully, wickedly, and maliciously causing the said Lydia falsely to be convicted on the said complaint charging her with larceny from the said Theodore L. Grant, and for no other purpose whatever;" that Grant accordingly committed perjury.

At the trial in the Superior Court, before Pitman, J., it appeared that on February 28, 1873, the defendant procured a search warrant to search for some articles of personal property alleged to be in the house occupied by Lydia L. Linnell, in Charlestown; and that the officers made the search and found some articles of personal property which the defendant claimed as his property, and that thereupon one of the officers made a complaint in the Police Court of said Charlestown charging Lydia with the larceny of said property; that the case came on for trial before the justice of said court, and that the said Lydia L. Linnell set up in defence that she was the lawful wife of the defendant, and therefore could not be convicted of the larceny of his property; that the defendant was called and sworn as a witness for the government, at the trial; and was asked the questions set forth in the indictment, and made the answers set forth in said indictment.

The only direct evidence of a marriage between the defendant and said Lydia was a marriage certificate signed by one Henry Duncan, and the testimony of Lydia that she and said defendant went to Providence on July 26, 1871, and were there married at the house of the Rev. Henry Duncan, who gave her said certificate, and that the defendant caused their marriage to be inserted in a Providence daily paper the afternoon of the same day, which paper she produced; that they returned to Boston, where they lived together a few days, and then removed to the house of the defendant, where they resided together until September 12, 1872, when they separated and did not

live together thereafter. There was other evidence tending to show that the parties had been together, and that the defendant had introduced the said Lydia as his wife before the separation. Lydia swore that she was not married at any other time or place than at Providence as aforesaid, and that there never had been any other ceremony of marriage between them.

The defendant testified that he never went to Providence with Lydia as alleged, and that no ceremony of marriage was ever performed between him and Lydia; that he had lived with Lydia, but not as husband and wife; and it was admitted by the district attorney that the certificate produced was not a genuine certificate, but was made by a man named Henry Duncan who resided in Chelsea or Charlestown. It appeared that the defendant could neither read nor write. It also appeared by his own testimony that he had a wife living in Boston to whom he was married more than twenty years ago.

The defendant asked the court to instruct the jury as follows: —

1. Unless the jury find that the parties were actually married or went through the form of marriage before some person supposed to be authorized to perform the marriage ceremony, this indictment cannot be maintained.

2. If the defendant had a lawful wife living other than Lydia Linnell, this indictment cannot be maintained.

3. The other allegations of perjury contained in the indictment are not material to the issue before the Police Court, if in point of fact the defendant and Lydia Linnell were not married or had not gone through the form of marriage.

The Court declined to give any of the instructions asked for, but instructed the jury as follows: "That it was admitted that in the trial upon which the alleged perjury was charged to have been committed, it was a material question whether the defendant was married to Lydia Linnell; that if the defendant then swore wilfully, falsely, and corruptly, as set forth in the indictment in relation to any matters therein assigned which were material to this issue, — that is, which tended to prove the marriage, though such matters were only circumstantial, — then he was guilty; that it was not necessary for the jury to find that the defendant was in fact married to, or had gone through with the form of marriage with said Linnell, if he had sworn falsely as aforesaid in relation to matters material, in the consideration of such question of marriage at said trial."

The jury returned a verdict of guilty, and the defendant alleged exceptions to the rulings and refusals of the Court.

G. A. Morse, for the defendant.

C. R. Train, Attorney-General for the Commonwealth.

DEVENS, J. The request made by the defendant was properly declined by the presiding judge. A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by so doing as to material circumstances which have a legitimate tendency to prove or disprove such fact. He cannot in the latter case exonerate himself from the offence, because, while the circumstances to which he thus swore did not exist, the fact sought to be established by them did exist. Even if the defendant was not married to Linnell, if he corruptly and falsely swore that he had not so represented, that he had not lived with her as his wife, and had not made an agreement of separation from her, this testimony was material in the decision of the issue as presented to the Police Court, and might therefore be properly included in the assignments of perjury contained in the indictment. The offence of the defendant consisted in making false statements intended to corrupt the administration of justice, by inducing the magistrate to render a decision based thereupon, and it is not the less an offence because the decision was in fact correct.

Exceptions overruled.

JAMES D. AVERY *v.* JESSE M. WARD,

150 MASS. 160 [1889].

TORT for slander, in accusing the plaintiff of subornation of perjury. The declaration in various counts alleged, in substance, that Peter Borlin was insured against loss by fire, under a policy issued by an insurance company doing business in this Commonwealth, upon a barn as well as upon a portion of its contents owned by him; that the barn and such contents, as well as three valuable cows belonging to the plaintiff and in the barn at the time, were burned; that after the loss Borlin prepared and rendered to the company a statement in writing, which he signed and made oath to setting forth the value of the property insured and his interest therein, with other facts required by the company in the policy, in order that he might recover from the company the damage he had sustained; and that the defendant publicly, falsely, and maliciously accused the plaintiff of the crime of attempting or endeavoring to incite and induce Borlin to commit the crime of perjury, by words spoken of the plaintiff substantially as follows: He [meaning the plaintiff] tried to make or get Peter Borlin to swear that the cows owned by the plaintiff which Borlin was keeping for him were his [Borlin's] cows, so that the plaintiff might get the pay for his cows from the insurance company through Borlin and by means of his [Borlin's] perjury.

At the trial in the Superior Court, before Dewey, J., it also appeared in evidence that the insurance policy referred to in the declaration was in the form known as the Massachusetts Standard Policy, prescribed by the Pub. Sts. c. 119, § 139; and that the defendant spoke the words of and concerning the plaintiff, substantially as alleged.

The defendant requested the judge to rule, that, upon all the evidence, the action could not be maintained, inasmuch as the oath to be made, in order to make a "statement on oath" as required on proof of loss by the insurance policy, was not an oath which if falsely taken could subject the person so taking it to punishment for the crime of perjury. The judge declined so to rule, and ruled that, if there was a loss sustained by fire under the policy by Borlin, and the provisions of the policy relating to the manner of proving the loss by a statement on oath had not been waived by and were required by the insurance company, such an oath as would be for the proof of loss under the policy was an oath required by law, within the meaning of section 2 of chapter 205 of the Public Statutes, and if falsely taken, would subject the person so taking such false oath to punishment for the crime of perjury.

The jury found for the plaintiff; and the defendant alleged exceptions.

C. C. Conant and *S. D. Conant*, for the defendant.

S. T. Field, for the plaintiff.

KNOWLTON, J. The principal question in this case is whether the oath taken by a policy-holder to the truth of a statement in writing, setting forth the particulars of a loss under his policy of insurance against fire, is an oath "required by law," within the meaning of the Pub. Sts. c. 205, § 2. This section is as follows: "Whoever, being required by law to take an oath or affirmation, wilfully swears or affirms falsely in regard to any matter or thing respecting which such oath or affirmation is required, shall be deemed guilty of perjury."

The St. of 1887, c. 214, § 60, which follows closely the Pub. Sts. c. 119, § 139, prescribes the form of policy to be used by all fire-insurance companies doing business in this Commonwealth, and requires a provision in the policy that in case of loss "a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured," etc. In the absence of any modification of this provision by the parties or waiver of it by the company, a policy-holder whose property has been burned is "required by law" to make such a statement under oath before he can maintain a suit to recover for his loss. The policy referred to in the present case contained this provision, and, under the instructions of the judge, the jury must have found that there was no waiver of it.

What interpretation should be given to the words "required by law,"

in the statute first quoted, is a question by no means free from difficulty. It has been said that the provision "might seem from its very general language to embrace all cases where an oath had been lawfully administered in the execution of official duty." Jones *v.* Daniels, 15 Gray, 438. But in the same case it is suggested that the language of the original statute from which it is derived (St. 1829, c. 56) seems to have had reference to oaths required by special provisions of statute. Both of these remarks were entirely outside of the question involved in the case then decided, and we are not aware that the statute has ever been before the court for construction. The fact that in so general a revision of our laws as that of 1835, the language was considerably changed, and the further fact that the law has been twice reenacted in substantially the form in which it was put in that revision, make the original statute of less importance than might otherwise be attached to it. Rev. Sts. c. 128, § 2; Gen. Sts. c. 163, § 2; Pub. Sts. 205, § 2.

The oath referred to in the plaintiff's declaration was essential to the preservation of the legal rights of the assured. Althongh not taken "in any proceedings in a course of justice," so that if false it would have subjected the affiant to punishment for perjury at the common law, or under section 1 of chapter 205 of the Public Statutes, it was within the reason of the rule of the common law, for it was taken in a preliminary proceeding which lay at the foundation of proceedings in court, and which would be subject to review in those proceedings. It was required under a contract which embodied the requirement in conformity to an express provision of the law. We think the spirit and purpose of the statute will best be conserved by so construing it that the requirement in the present case shall be deemed to have been a requirement "by law," such that it would have subjected the assured to punishment for perjury if he had wilfully sworn falsely.

The words alleged to have been spoken of the plaintiff were sufficient to impute to him the crime of attempting to induce and incite Borlin to commit the crime of perjury. Such a crime could be committed by the use of words alone. *Exceptions overruled.*

CHAPTER XLVI.

NUISANCE.

KNOX v. THE MAYOR, &c. OF THE CITY OF NEW YORK, 55 BARBOUR, 404 [1868].

THIS was a suit in equity, brought by the plaintiff for the abatement and removal of an alleged public nuisance, claimed by the plaintiff to be specially injurious to himself. The alleged nuisance was a bridge across Broadway, at the junction with Fulton Street, in the city of New York. The plaintiff was lessee for a term of years of certain premises situated on the corner of Broadway and Fulton Streets, upon which he had erected a building at an expense of $75,000, which building was occupied in part by the plaintiff as a store, and in part it had been leased out to, and was occupied by, his under tenants.

Hamilton W. Robinson, for the plaintiff.

Andrew J. Rogers, for the defendants.

DANIELS, J. The structure which the plaintiff in this action alleges has been erected and is now maintained by the defendant in violation of his rights as tenant and occupant of the premises mentioned, is a bridge elevated at the height of eighteen feet over the junction of Fulton Street and Broadway. This bridge is reached by stairs provided for that purpose at each of its corners, resting upon the sidewalks on Broadway. They extended to such a distance along the sidewalks, from the sides of the top of the bridge, as to afford proper means of ascending to, and descending from the bridge itself. In front of the plaintiff's store the sidewalk is thirteen feet in width, and the stairs to the bridge have been so constructed as to occupy just one half of this space. The northeasterly stairs ascend from the walk to the bridge across a considerable portion of the front of the store occupied by the plaintiff, obstructing the free passage of the light into the store, and rendering the rear portion of it so dark as to require the gas to be lighted, for a part of the day at least, in order to enable the plaintiff to carry on and transact his business. The evidence also quite satisfactorily showed that the upper portion of the building, which the plaintiff had previously leased for offices and other similar purposes, had been so far injured by this bridge being in front of them, and the obstruction

to the approaches to it caused by pedestrians passing along the walks, that they had been deserted by the tenants, and he was unable to procure others to occupy them. And in addition to that, the persons who passed along the streets at this point, on account of the diminished capacity of the sidewalk by the erection of the stairs to the bridge, blockaded the front of his store, rendering it inconvenient for goods to be taken to and removed from it, and for his customers to pass in and out, and frequently driving the persons collected upon the walk, through the inside of his store, for the purpose of passing and repassing between Broadway and Fulton Street.

No reason exists, under the evidence given, for doubting the truth of these statements. And assuming them to be true, as the Court is bound to do, even though they may be somewhat colored, they exhibit such a clear case of special injury to the plaintiff as will enable him to maintain the present action. If the structure complained of can justly be declared to be a public nuisance, it is necessary that it shall be shown to have been erected and maintained in violation of law, and that it shall be found to render the enjoyment of the rights obstructed by it inconvenient, unwholesome, or uncomfortable. On account of the large amount of travel upon the streets and on the walks at this point, the former frequently became so completely obstructed and blockaded by vehicles as to render it impossible, for the time being, for pedestrians to effect a crossing; and when that was not the case, crossing these streets by persons on foot was frequently difficult as well as dangerous. It was to relieve pedestrians from these interruptions and dangers that the defendant erected and has since maintained this bridge. When the streets have been very wet and muddy, and in the winter season when the melting snow or ice has rendered a passage over them troublesome and difficult, then the evidence shows that this bridge has been used, but even then not to such an extent as to justify the conclusion that it has afforded any great or substantial relief to the walks themselves, or the persons using them. Even at those periods the bridge does not appear to be used to such an extent as to accommodate a number of people equal to that which the stairs obstruct, by contracting and reducing the capacity of the walk. During the ordinary weather which prevails, a much smaller proportion of people make use of it, and for much of the time its chief purpose seems to be that of affording convenient accommodation for persons desirous of observing the movements upon the streets.

The obstacles interposed by the stairs themselves to the free and unobstructed use of the sidewalks at all times are much greater than the convenience and facilities afforded to persons using them by the bridge. The latter, therefore, constitutes a positive obstruction to

those who are entitled to the enjoyment and use of the sidewalks at this part of the city, instead of adding to or promoting their convenience. And such appears to be the manner in which it is commonly regarded, for pedestrians seem to prefer encountering the delay, difficulty, and danger of crossing upon the surface of the streets themselves, to the performance of the labor required to make a combined ascent and descent of thirty-six feet, for the purpose of securing freedom from these obstacles by crossing over the bridge. Of the two, the journey over the bridge, in the judgment of those using the walks, appears to be regarded as the most difficult to be made.

For these reasons the bridge is not such a structure as can, in any proper or legal sense, be pronounced an improvement promoting the convenient use and enjoyment of the streets. It not only impairs the value and usefulness of the adjacent property, but beyond that, it renders it exceedingly inconvenient to use it for some of the ordinary purposes of business, and deprives pedestrians of thirteen feet of sidewalk that previous to its erection was capable of being freely used by them, without affording or providing them any corresponding or adequate advantage for the obstacles placed in their way. It is attended with those consequences, therefore, which in a legal sense constitute a public as well as a private nuisance. But whether that can be held to be its legal character, will depend entirely upon whether it was properly and lawfully placed there.

The land upon which Broadway, at this point, has been constructed, was shown upon the trial to have been dedicated, by those under whom the plaintiff has derived his estate, for the uses and purposes of a public street. In this respect it differs from many of the streets of the city where the fee of the land was in the public at large, and by legislation was afterwards transferred to the city, and also from those streets to which the city acquired title in fee by proceedings taken for opening them. In these cases the streets may be devoted to many public purposes that would be entirely unwarrantable and unjustifiable, where a simple dedication of the land for the purposes of a street was all that had taken place. Hence, in the former, the legislature of the State may authorize the construction of railways over the streets, without the consent of, and without compensation to, the adjacent owners of the property (The People *v.* Kerr, 27 N. Y. Rep. 188); while in the latter case, neither the legislature nor the common council of the city can authorize or sanction such an appropriation of the street, without obtaining the consent of, or making compensation to, such owners. Williams *v.* N. Y. Central Railroad Co., 16 N. Y. Rep. 97. In this case it was held that the legislature had no such authority over the public streets of a city as would permit it to authorize such a use of

them. This authority also holds that the public acquire only such an interest in land appropriated by dedication to the uses and purposes of a highway as will entitle them to use it for that object. And subject to that right, which is denominated an easement, the person or persons making the dedication, and those acquiring the property under them, still retain the fee of the land.

For this reason, persons improperly appropriating or using the street for purposes not legitimately appertaining to it as a street, may be successfully prosecuted by the owner of the fee subject to the easement, and made to respond for the act in damages, or to surrender the property itself, as the particular case may require. The right which the public acquire by means of the dedication and the acceptance of it, is that of using the land simply as a street and for nothing whatever beyond that. Incidental to this, and as a necessary part of it, the public possess the right of rendering the street as convenient, useful, commodious, safe, and wholesome, as it can be by means of such improvement and regulations as experience has discovered to be adapted to those ends. To accomplish those results it may be graded, curbed, paved, and sewered, and provided with the requisite gas and water pipes to light and clean it; and the manner in which excavations may be made or maintained in or under it, may be suitably and safely controlled by the public authorities having charge of the easement for the benefit of the public. But all this is done and permitted for one end and purpose, and that is, to render the streets as convenient, safe, useful, and wholesome as they may be, for those having occasion to use them for the purpose of passing over them. Many other improvements in this respect may, and undoubtedly will, be discovered, and made to increase the safety and facilities of the public in the use of streets; but it may very well be questioned whether experiments like the one in controversy will be found to have sufficient tendency in that direction to justify a repetition of it.

Beyond this right of improving and regulating the manner in which the streets may be used, where the public have acquired only the easement secured by the dedication, the public have no right to make use of the land over which the streets may be lawfully maintained and preserved. It was claimed, upon the trial, that the provisions in the early charters conferred upon this city would authorize a more unrestricted use than that of the land devoted to the purposes of a street. But even if these statutes were themselves capable of being so construed, which certainly would admit of very great doubt indeed, such a construction could not be sanctioned at the time when this bridge was erected, for the constitution of this State had long before that intervened with its potent injunctions that no person should be deprived of his

property without due process of law, and that private property should only be taken for public purposes by properly and justly compensating the owner for it. Constitution of 1822, art. 7, §§ 1, 7; 1 R. S. 44, 45, 5th ed. And these provisions have been prominently placed in the constitutions formed in this State since that time. The interest which the owners of the fee had in the land dedicated to the use of the street was property, in the legal as well as popular signification of that term, recognized and protected as such, the same as the other property of the owner, by laws of this State, and therefore within these constitutional provisions. And even if the statutes previously existing within the city were of themselves so comprehensive as to allow the owner to be deprived of it without compensation and without due process of law, as long as the right secured by them was not resorted to, or in any manner rendered available, until after these constitutional limitations had prohibited that from being done, they will not and cannot in any manner impair the rights of the owner in this respect. Those rights are now, and were when this bridge was erected, within the restrictions imposed upon the public authorities by these salutary provisions of the constitution.

And it was not, therefore, within the power of the common council or of the legislature, or both combined, to deprive the defendant of them, unless the measures for doing so were taken in conformity to its requirements. These measures only could be effectual in this respect which would provide compensation for the property taken, or would result in the assent of the person entitled to its enjoyment.

Without one or the other, the act of appropriating the property in question would necessarily be illegal and unjustifiable, if it has imposed an additional easement or burden upon the property beyond that included in the dedication. If that be its character, the provisions of the Act of 1866, authorizing a certain amount to be raised by taxation for the purpose of paying for the erection of the bridge, would not deprive the plaintiff of any of his rights for redress on account of it. Laws of 1866, p. 2060. An act of the legislature is not itself due process of law, within the contemplation and meaning of the constitution. And this Act provided no compensation for the owner whose property has been rendered subservient to the maintenance of this structure.

An attempt was made, on the part of the defendant, to show that the present plaintiff consented to the erection of this bridge, but no evidence was given which warranted that conclusion as a matter of fact. The right of the owner of this corner to the fee of the land in the street, subject to the easement of the public, has been acquired by the plaintiff by virtue of the lease executed and delivered to him. That bounds the land leased on the street, which, by a well-settled

rule of construction, extended the line to the centre of the street. Bissell *v.* N. Y. Central Railroad Co., 23 N. Y. Rep. 61; Perrin *v.* Same, 36 id. 120. The plaintiff, therefore, is legally entitled to complain of this, if it has imposed a new burden or servitude upon his land in the street, beyond that devoted to the use of the public, which in substance was one of passage merely.

This bridge is a structure permanently erected over the streets, appropriating for its support, and the avenues to it, thirteen feet, in the aggregate, of that part of the street which had been devoted to the use and convenience of pedestrians. It was not done for the purpose of improving the easement upon and over the land itself, which the public were and are entitled to enjoy, and it has no tendency whatever to produce any such improvement; but for the purpose of creating a new and distinct servitude above the streets and above the land upon which the public easement was created. The fact that a portion of the street has been exclusively devoted to the support of this structure is sufficient to show that it can be no development or improvement of the pre-existing easement, for that actually deprives the public of the use of so much of the easement itself as the bridge requires for its own support. If the appropriation of a portion of the street or sidewalks can be justified for this purpose, it may also be for the support of any other device that can be made useful in transferring persons from one side to the other side of a blockaded or crowded street. If the object in view is sufficient to justify the exercise of the power, it may be used in any manner that either ingenuity or fancy may suggest. And if a bridge is found to fail in fulfilling the expectation in this respect of those who designed and erected it, hoisting apparatus, with cranes and engines for its use, may be substituted in its place. And this may be done not only where the streets are liable to become blockaded and dangerous, but whenever that condition may be reasonably apprehended. If this may be done, nothing would appear to be in the way of a raised walk, not only across, but along the streets themselves. The power over the streets that will authorize and sanction one, will permit the existence of the others. If it could be sustained, it is capable of being used in such a manner as not only to seriously impede, and impair the public utility of streets as avenues for travel, but beyond that, it would be in danger of rendering them not only annoying, but useless to those who should endeavor to carry on business upon them.

Within the well-settled principles of law applicable to the government and improvement of public streets, no such erection as the one complained of can constitute a proper exercise of the power over them that has been confided to the public authorities. It is so entirely

unadapted to the improvement or enjoyment of the street as to be incapable of promoting the utility of the easement which the public have in it, in any respect whatever. On the contrary, it is a permanent obstruction, in the way of existence and enjoyment of the easement, and to that extent deprives the public of the use of that which has been dedicated and designed for their convenience and accommodation. As such it is a public nuisance, which may be and should be abated and removed. People *v.* Cunningham, 1 Denio, 524; People *v.* Vanderbilt, 28 N. Y. Rep. 396.

And as the structure has necessarily appropriated for its support the land which the plaintiff is entitled to have maintained open and unobstructed, subject only to the right of the public to pass and repass over it, and temporarily to occupy it for the improvement and more perfect enjoyment of that right, and special injury has been occasioned to him in consequence of it, he has made out and sustained his right to insist upon such abatement and removal. He cannot, however, recover in this action the damages he has sustained by reason of such injury, because he did not present his claim for them to the comptroller for adjustment, as he was required to do by the statute, before he commenced the action. Laws of 1860, p. 645, § 2.

If the action had been for their recovery alone, it would have been plainly within the language of this statute. The fact that further relief of an equitable nature has been also demanded, cannot have the effect of excluding from the operation of the statute that which would otherwise have been so plainly within it.

The plaintiff must have judgment directing the removal or abatement of this bridge as a nuisance, within ninety days after service, upon the proper officer of the defendant, of a certified copy of the judgment, without prejudice to the plaintiff's right to maintain an action at law for the recovery of the damages sustained by him. As both parties have succeeded in part, neither is entitled to recover costs as against the other.

THE STATE *v.* KASTER,

35 Iowa, 221 [1872].

Appeal from Henry District Court.

Indictment for erecting and maintaining a nuisance. Verdict of guilty. Judgment that the nuisance be abated, and that defendant pay the costs thereof and of the prosecution. Defendant appeals.

The further facts are stated in the opinion of the Court.

Amblers and *Babb*, for the appellant.

M. E. Cutts, Attorney-General, for the State.

MILLER, J. The indictment in this case charges that the defendant, J. W. Kaster, on , etc., "at the County of Henry and State of Iowa, in Center township in said county, near unto divers public streets, being the common highway, and also near unto the dwelling-houses of divers citizens of the State, there situate and being, unlawfully and injuriously did make, erect, set up, continue, and use, and did cause and procure to be made, erected, set up, continued, and used, a certain enclosure, pen, or lot of ground, in which cattle and hogs were confined, fed, matured, and retained, and the excrements, decayed food, slop, and other filth retained upon and within said enclosure," etc., "which employment or use of said enclosure," etc., "for said purpose, and permitting of said excrement, decayed food, slop, and filth to remain upon and within said enclosure," etc., "occasioned noxious exhalations, offensive smells, unwholesome smells, so that the air was then and there greatly corrupted and infected thereby, and other annoyances becoming and being dangerous to the health, comfort, and being a common and public nuisance to the good people of the State of Iowa there passing, repassing, being, or residing," etc.

On the trial the Court, against defendant's objection, admitted witnesses to testify that the noise made by hogs in the enclosure or pens of defendant was very great and annoying at night to persons residing in the neighborhood; and this ruling is assigned as error.

Our statute (Rev., § 4409) provides that "The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture which, by occasioning noxious exhalations, offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public; the causing or suffering offal or noisome substance to be collected or remain in any place to the prejudice of others — are nuisances."

Under this statute and the indictment in this case, the annoyances resulting from the erection and maintenance of the nuisance charged constituted the gist of the offence; and while it was not competent, under the general charge of "other annoyances" in the indictment, to prove that the people of the neighborhood were annoyed at night by the noises made by hogs in defendant's pens, yet we are of opinion that the testimony objected to was properly received as part of the facts connected with the nuisance charged, and also as corroborative of the fact that hogs were kept and retained in the pens at night.

If the evidence was competent for any purpose, its admission was not erroneous.

The defendant called as a witness one Hugh McClure, and proposed to prove by him that the enclosure charged as a nuisance "was a great and essential accommodation to the public; that, owing to the lay of the ground and locality of the premises, they were less offensive to the community than any other premises could be that would accommodate the shipping public; and that they were as well kept as they could be." This evidence was objected to by the State and excluded by the Court, and this ruling is assigned as error.

In Rex *v.* Russell, 6 Barn. & Cress. (Eng. Com. L. R., vol. 13, p. 254) 566, it was held by Mr. Justice Bayley, at *nisi prius*, that where a great public benefit accrues, from which arises the abridgment of the right of passage, that abridgment is not a nuisance, but proper and beneficial. But in Rex *v.* Ward, 4 Adolph. & E. 384 (31 Eng. Com. L. 92), Russell's case was expressly overruled by the Court of King's Bench, and it is there held that a defendant indicted for nuisance "will not be permitted to show that the public benefit resulting from his act is equal to the public inconvenience which arises from it." In support of this doctrine, see, also, Respublica *v.* Caldwell, 1 Dall. 150; Angell on Tide-waters, chap. 8; Roscoe's Cr. Ev., pp. 568, 790; Hart *v.* The Mayor, etc., of Albany, 9 Wend. 571, 582; Wharton's Am. Cr. Law (3d ed.), 799, and cases cited; 3 Greenl. on Ev., § 187.

There was, therefore, no error in the exclusion of the proposed evidence.

It is next urged that the second and fourth instructions given by the Court were erroneous. These instructions are almost in the precise language of section 4409 of the Revision defining the crime of nuisance, and clearly mean the same thing, and, fairly construed, could not have misled the jury.

Also it is urged that the evidence is insufficient to support the verdict, because the alleged nuisance is not shown to have been an annoyance to the public generally; and it is claimed that section 4409 of the Revision, under which defendant is indicted, provides no remedy for any public nuisance.

This section defines what acts constitute nuisances, and section 4412 (of the same chapter) provides, that "Whoever is convicted of erecting, causing, or continuing a public nuisance or common nuisance as described in this chapter or at common law, when the same has not been modified or repealed by the statute, shall be punished by a fine not exceeding $1000, and the court, with or without such fine, may order such nuisance to be held abated, and issue a warrant," etc.

We need not determine whether each of the nuisances defined in section 4409 is not to be considered a public nuisance, and as such

indictable, for it is clear that the acts charged in the indictment in this case constitute a public indictable nuisance, both under this section and at common law. The indictment charges that the acts specified occasioned noxious exhalations, offensive and unwholesome smells, so that the air was then and there greatly corrupted and infected thereby, becoming and being dangerous to the health, comfort, etc., of all the good people of the State there passing, repassing, being, or residing. It also alleges that the enclosure from whence issued these noxious exhalations and offensive and unwholesome smells is situated near to divers public streets and highways. The evidence shows that the pens are within a few rods of a public street, and that persons passing thereon have been greatly annoyed by offensive smells issuing therefrom. It also appears that the pens are situated in a populous neighborhood. These facts established the public character of the nuisance.

Affirmed.

COMMONWEALTH *v.* PERRY,

139 Mass. 198 [1885].

Indictment charging that the defendant on June 1, 1884, and on divers other days and times between that day and December 2, 1884, at Needham, "near the dwelling-houses of divers good citizens of the said Commonwealth, and also near divers public streets and common highways there situate, then and there did keep and maintain, and yet doth keep and maintain, a large number of swine, to wit, five hundred; by reason whereof divers large quantities of noisome, noxious, and unwholesome smokes, smells, and stenches, on the days and times aforesaid, then and there were emitted, sent forth, and issued, and the air thereabouts on the days and times aforesaid was greatly filled and impregnated with many noisome, offensive, and unwholesome smells, stinks, and stenches, and has been corrupted and rendered very insalubrious to the great damage and common nuisance of all the citizens of said Commonwealth there being, inhabiting and dwelling, passing and re-passing to the evil example of all others in like case offending against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.

In the Superior Court, before the jury were impanelled, the defendant moved to quash the indictment, for the following reasons: "1. The indictment sets forth no crime or offence known to the law. 2. No offence or crime is fully, plainly, substantially, and formally set forth therein. 3. It is not therein alleged that the neighborhood in

which said alleged nuisance is located, is a populous neighborhood." This motion was overruled; and the defendant excepted.

The defendant was then tried before Bacon, J., who allowed a bill of exceptions in substance as follows: The government introduced evidence tending to show that the defendant, between the dates mentioned in the indictment, kept and maintained, in the town of Needham, on his premises consisting of about twenty-five acres of farming land, swine, to the number mentioned in the indictment; that on said premises, and within a few feet of the marked Tree Road, a public highway, which bounded them on the west, there was a building used as a boiler-house, wherein the food for the swine was cooked, parts of which building were used as dwellings by the defendant's employees and their families; that on the east of said building was a large building arranged for keeping swine, similar to the other, each of said buildings being connected with the next one west of it. Each of the buildings in which swine were kept was about two hundred and fifty feet in length, divided into about seventy-five pens, with wooden floors; that the swine were during the latter part of said time all kept in said buildings, but during the rest of said time some had been allowed to range through a lot or field of about three acres, adjoining said buildings, some had been kept in pens adjoining said buildings, and some in the buildings; that Great Plain Avenue, a public highway, bounded said premises on the north, and intersected with said marked Tree Road at a distance of eight hundred to a thousand feet from the place where said swine were kept; that the nearest dwelling-houses were about five hundred or eight hundred feet from said place; that on either side of Great Plain Avenue, both east and west of said intersection, and also on streets leading off of said avenue, there were, within a radius of one fourth of a mile from said place, a number of dwelling-houses, and a larger number within a radius of half a mile; that odors were borne on the wind from the said place, and were noticeable on said highways; that said odors produced discomfort, sickness, and disgust to some of the occupants of said dwelling-houses; that at times they were so intense that some of said occupants were obliged to close their doors and windows; that said odors were the odors natural to swine, described by one witness, as "pig odors," and by another as "the odor of one pig multiplied five hundred times," and by one other as "the odor of a piggery."

It was conceded that no swill, slops, or unclean food was fed to said swine, but that they were fed only on good grains, beets, and other vegetables. It was also in evidence that farming and the raising of swine were largely carried on at various parts of the town; in some cases, near the defendant's premises.

The defendant introduced evidence tending to show that said odors did not emanate from his premises; that there were other sources and places in the vicinity from which they might proceed; and that such odors as were emitted from his premises were merely the natural odors of swine, and were not offensive in character or degree.

The defendant offered to show, as bearing upon the question whether the establishment complained of in the indictment was a nuisance, on account of its proximity to highways and dwelling-houses, that throughout the Commonwealth it had been and was customary to locate and conduct such establishments, containing similar or greater numbers of swine, in much more populous localities, and nearer to dwelling-houses and travelled streets; that such establishments have so existed for years, and are tolerated by the usage and customs and habits of society in the present day in this Commonwealth. The judge ruled that such evidence was inadmissible.

The defendant requested the judge to instruct the jury as follows: "Evidence of the natural odors which come from the bodies of domestic animals (however annoying to certain persons) will not sustain an indictment for a nuisance. The keeping of swine to the number of five hundred near dwelling-houses and streets of a town is not *per se* a nuisance."

The judge refused so to rule, but on this branch of the case instructed the jury as follows: "The natural odor of one animal might not be a nuisance, but the natural odor of five hundred might be. It is for the jury to say whether it was so in this case. Five hundred swine kept in the vicinity of roads and dwelling-houses might become a nuisance, where one would not. People residing in the neighborhood of this piggery have a right to have the air free and uncontaminated by odors, smells, and stenches offensive to the senses. It is not necessary for the government to show that the contamination of the atmosphere is to such an extent as to cause actual injury to health, but it will be sufficient for it to show that the smells and stenches are so offensive as to render the residences and habitations in the vicinity uncomfortable. The keeping of swine to the number of five hundred near dwelling-houses and streets of a town will become a nuisance, if smells and stenches actually emitted from such keeping are such as to render such dwelling-houses uncomfortable for residents, or to render the passing in said streets uncomfortable."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. J. Boardman and *S. H. Tyng*, for the defendant.

H. N. Shepard, Assistant Attorney-General, for the Commonwealth.

HOLMES, J. A piggery in which swine are kept in such numbers that their natural odors fill the air thereabouts, and make the occupation of the neighboring houses and passage over the adjacent highways disagreeable, or worse, is a nuisance. Commonwealth *v.* Kidder, 107 Mass. 188, 192; Regina *v.* Wigg, 2 Salk. 460; s. c. 2 Ld. Raym. 1163. See Commonwealth *v.* Oaks, 113 Mass. 8; Commonwealth *v.* Upton, 6 Gray, 473. The indictment was sufficient, and the instructions asked were erroneous. See, further, Commonwealth *v.* Rumford Chemical Works, 16 Gray, 231; Commonwealth *v.* Sweeney, 131 Mass. 579; Commonwealth *v.* Brown, 13 Met. 365. No defect has been pointed out in the instructions given. It would have been well if they had impressed more fully on the jury that the question was one of degree; but that was implied by what was said, and the defendant asked nothing more specific.

Evidence of the practice throughout the Commonwealth was inadmissible. See Cutter *v.* Howe, 122 Mass. 541, 549.

Exceptions overruled.

COMMONWEALTH *v.* MILLER ET AL.,

139 PA. ST. 77 [1890].

APPEAL by defendants from the Court of Quarters Session of Allegheny County.

Before PAXTON, C. J., STERRETT, GREEN, WILLIAMS, MCCULLUM, and MITCHEL, JJ.

On October 4, 1889, the grand jury returned as a true bill an indictment charging A. D. Miller, A. D. Miller, Jr., and R. B. Miller, with erecting and maintaining a common nuisance. The indictment was in four counts, charging in substance:

1. That the defendants, on August 1, 1889, at a certain place in the city of Allegheny (describing a certain square), near to divers public streets and to the dwellings of divers citizens of said county, unlawfully and injuriously did make, erect, and set up certain buildings to be used as an oil refinery; and the said buildings, from that day continuously until the taking of the inquisition, did and still do maintain, to the common nuisance, etc., and contrary to the form of the act of assembly, etc.

2. That the defendants on that day and year aforesaid, at a certain place in the city of Allegheny, etc., unlawfully and injuriously did erect and set up certain buildings, wherein were then, and yet are, stored and kept large quantities of explosive and inflammable oils, and

did erect, set up, and maintain certain tanks, stills, etc., used in the refining and distillation of crude petroleum; by reason whereof divers noxious, unwholesome, deleterious, and explosive smells, stenches, vapors, and gases did and do arise, and in consequence thereof the air in the neighborhood was and is yet greatly impregnated with the noxious, etc. smells, and was and is rendered unwholesome and insalubrious; and the defendants, from the day and year aforesaid continually until the taking of this inquisition, the said buildings, tanks, stills, etc., unlawfully and injuriously did and still do maintain, to the common nuisance, etc, contrary, etc.

3. That the defendants, on the day and year aforesaid, unlawfully and injuriously did erect and set up certain buildings, tanks, stills, etc., employed in refining oil located in the city of Allegheny, at a certain place, etc., in which stills, etc., were placed divers large quantities of explosive and inflammable oils, etc., and did on said day and year and continually thence until the taking of this inquisition, and yet do conduct their said business of refining and storing oil at the place aforesaid, in such a manner as to cause vast quantities of offensive, noxious, dangerous and explosive gases, vapors, and odors, to issue therefrom; by reason whereof the air there and thereabouts was greatly filled with unwholesome, etc., vapors; to the great damage and nuisance of all the good citizens, etc., contrary, etc.

4. That the defendants, on the day and year aforesaid, and on divers other days between that day and the day of the taking of this inquisition, with force and arms, at a certain place in the city of Allegheny, etc., near to the dwellings of divers good citizens of this county and to divers public streets, unlawfully, negligently, and improvidently did and still do keep, in certain stills, tanks, etc., divers large quantities of dangerous, inflammable, and explosive oils, to wit, certain crude petroleum, benzine, etc., whereby divers good citizens of said county there residing, passing and repassing, are in great danger; to the great damage and common nuisance, etc., contrary, etc.

The defendants pleaded not guilty.

At the trial on November 26, 1889, the following facts were shown:

The oil refinery of the defendants, the subject of the indictment, was erected upon a tract of about four acres of land in the sixth ward of the city of Allegheny, bounded by the Ohio River, Adams Street, and Preble and Washington Avenues. It was built originally by one Hutchinson some time prior to 1862. In 1872 it was purchased by the defendants, and they have since operated it. The Pittsburg & Western Railroad track passes between the refinery buildings and the river, and the Cleveland & Pittsburg Railroad is laid upon the street which bounds the opposite side of the property, both railroads having switch

connections with the refinery premises. About seventy-five men were employed by the defendants in connection with their business.

A large number of witnesses testified, for the Commonwealth, to the emission by the defendants' refinery of offensive and noxious smells. The greater number of them testified that they did not notice such smells after August 1, 1889, at least to any considerable extent. There was testimony, also, relating to dangers to surrounding buildings from fire and explosions in the refinery. It appeared that in August, 1889, a part of the refinery was destroyed by a fire, the extinguishment of which required the efforts of the city fire department for nearly twenty-four hours.

The jury rendered a verdict finding the defendants guilty in manner and form as indicted. Thereupon the defendants made a motion in arrest of judgment.

Mr. Justice Williams. The defendants own and operate a refinery where crude petroleum and its products are prepared for market. There are four acres within the enclosure fronting on the Ohio River. The Pittsburg & Western Railroad passes in front of it, along the river's edge. The Cleveland & Pittsburg Railroad runs upon the street directly in the rear. The city of Allegheny, like its sister city Pittsburg, owes its growth and prosperity to the extent of its manufacturing interests, and the river front is almost wholly given over to the great industries. The indictment charges that the defendants' refinery is a public and common nuisance, because of the emission therefrom of certain noxious and offensive smells and vapors, and because the oils and gases stored and used therein are inflammable, explosive, and dangerous. The jury, under the instructions of the Court, found the defendants guilty, and the sentence which has been pronounced requires the abatement or destruction of a plant in which some three hundred thousand dollars are said to be invested, and which gives employment to seventy-five men. The assignments of error are quite numerous, but the important questions raised are few.

The first four assignments, the sixth, ninth, tenth, and sixteenth, may be considered together, as they relate more or less directly to the same subject. The learned judge had his attention directed by the written points to the definition of a public nuisance, and to the circumstances under which the defendants' refinery had been established and maintained for many years; and he instructed the jury that the character of the location where the refinery was established, the nature and importance of the business, the length of time it had been in operation, the capital invested, and the influence of the business upon the growth and prosperity of the community, were no defence to an indictment for nuisance. Among other expressions used by him are the following:

"It is no defence to an indictment for a common nuisance that the business complained of has been in operation many years." "I do not think the size of an establishment makes any difference." And again: "Neither is it a defence in any measure that the business is a useful one," etc. If it had been an admitted or an established fact that the business of the defendants was a common nuisance, and they have attempted to justify its maintenance, these instructions would have been appropriate; but the question before the jury was whether the business was a nuisance. The decision of that question depended upon a knowledge of all the circumstances peculiar to the business, the place, its surroundings, and the employments of the persons in the vicinity. While no one of these, nor all together, would justify the maintenance of a nuisance, they might be sufficient, and they certainly were competent evidence from which the jury might determine whether the defendants' refinery was a common nuisance at the place where it was located, and this was the question to be determined by the trial. They might make, therefore, or contribute to make, a defence to the indictment trying. This distinction between an effort to justify an admitted or established nuisance, and a denial that the business complained of amounts to a nuisance, was evidently in the mind of the learned judge, but in the haste that attends jury trials, he failed to place it clearly before the jury. He did say that the facts referred to had "weight, and are to be considered in determining the degree of the injury pronounced, and whether the effects are so annoying, so productive of inconvenience and discomfort, that it can be said to be really so prejudicial to the public as to be a nuisance," but, following an explicit statement that these same facts were "no defence to an indictment for erecting and maintaining a nuisance," such as they were then trying, the jury was left without an adequate presentation of the defence.

That such facts are proper for consideration and may make a defence, has been long and well settled. Wood on Nuisance, § 430. The same rule was applied in this State in Huckenstine's App., 70 Pa. 102, and in Commonwealth *v.* Reed, 34 Pa. 275. The character of the business complained of must be determined in view of its own peculiar location and surroundings, and not by the application of any abstract principle. Wood *v.* Sutcliffe, 8 Eng. L. & E. 221. In the case last cited, Lord Cranworth referred to a case at *nisi prius*, in which he had instructed the jury to consider, not only whether the quantity of smoke complained of would amount to a nuisance, considered abstractly, but "whether it is a nuisance to a person living in Shields," which was the name of the town in which the business was conducted. It was in this respect that the instructions complained of in the first, second, and third specifi-

cations were inadequate. They gave the general rule without the qualification which the situation of the defendants' refinery entitled him to. The right to pure air is, in one sense, an absolute one, for all persons have the right to life and health, and such a contamination of the air as is injurious to health cannot be justified, but in another sense, it is relative, and depends upon one's surroundings. People who live in great cities that are sustained by manufacturing enterprises must necessarily be subject to many annoyances and positive discomforts, by reason of noise, dust, smoke, and odors more or less disagreeable, produced by and resulting from the business that supports the city. They can only be relieved from them by going into the open country. The defendants had a right to have the character of their business determined in the light of all the surrounding circumstances, including the character of Allegheny as a manufacturing city, and the manner of the use of the river front for manufacturing purposes. If looked at in this way, it is a common nuisance, and should be removed; if not, it may be conducted without subjecting the proprietors to the pecuniary loss which its removal would involve.

Judgment reversed.

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COMPARATIVE INDEX

TO MAY'S CRIMINAL LAW, SECOND EDITION, AND CHAPLIN'S CASES ON CRIMINAL LAW.